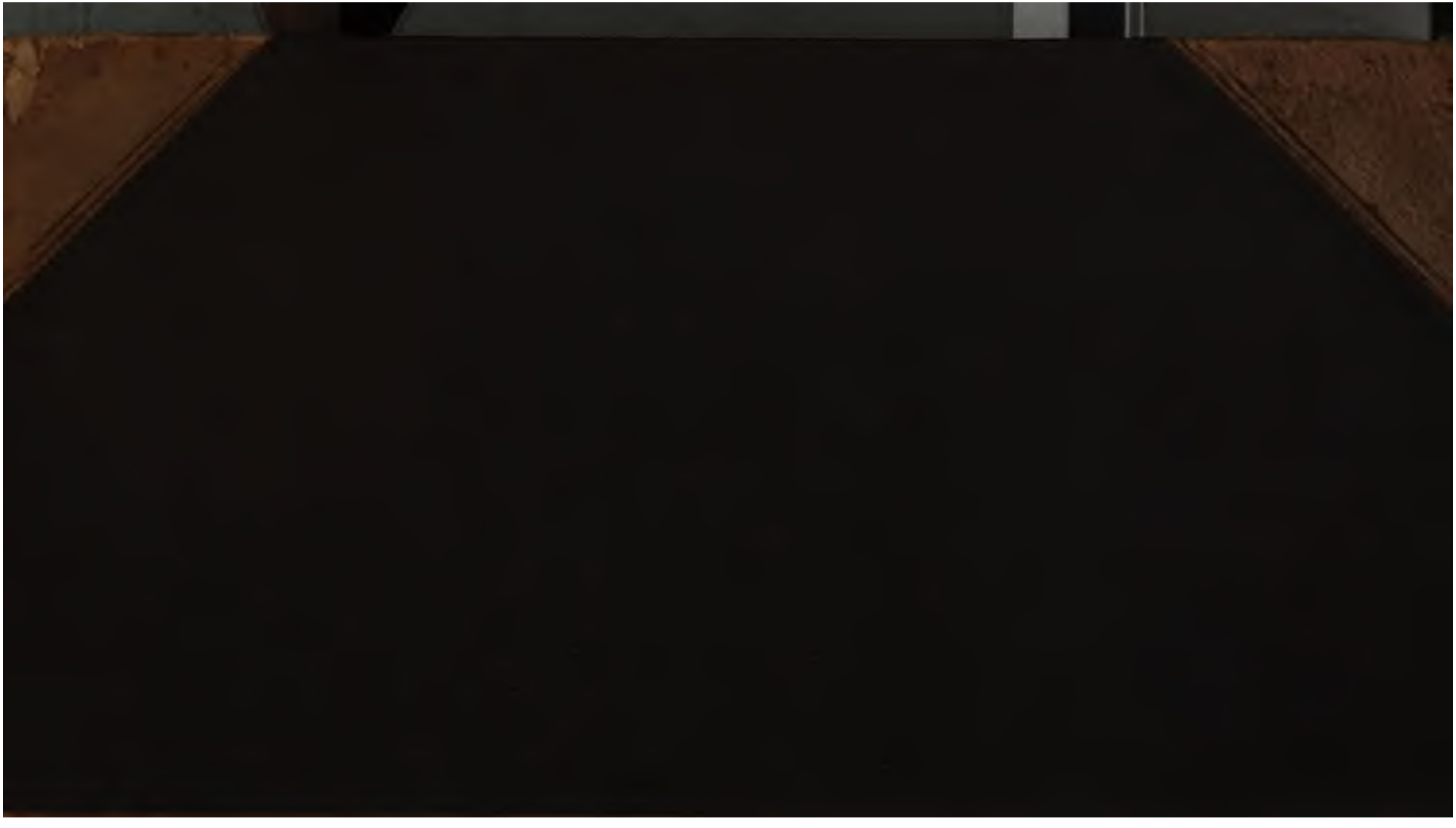

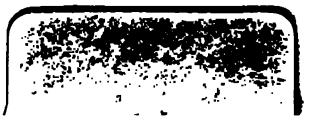

REPORTS OF CASES

ARGUED AND DETERMINED

IN

The Court of King's Bench,

AND

UPON WRITS OF ERROR FROM THAT COURT

TO THE

Exchequer Chamber,

AND IN

THE BAIL COURT,

WITH

A TABLE OF THE NAMES OF CASES

AND

A DIGEST OF THE PRINCIPAL MATTERS.

BY

GRAHAM WILLMORE, F. L. WOLLASTON,

AND H. DAVISON, ESQRS.

BARRISTERS AT LAW.

FROM HILARY TERM, SEVENTH WILL. IV. 1837,
TO MICHAELMAS TERM, FIRST VICT. 1837,
BOTH INCLUSIVE.

LONDON:

HENRY BUTTERWORTH,

Law Bookseller and Publisher,

7, FLEET STREET;

AND RICHARD PHENEY, 89, CHANCERY LANE.

1839.

LONDON:
C. ROWORTH, AND SONS, PRINTERS, BELL-YARD,
TEMPLE-BAR.

JUDGES

OF THE

COURT OF KING'S BENCH

During the Period of these Reports.

The Right Hon. THOMAS Lord DENMAN, C. J.
The Hon. Sir JOSEPH LITTLEDALE, Knt.
The Hon. Sir JOHN PATTESON, Knt.
The Hon. Sir JOHN WILLIAMS, Knt.
The Hon. Sir JOHN TAYLOR COLERIDGE, Knt.

ATTORNEY-GENERAL.

Sir JOHN CAMPBELL, Knt.

SOLICITOR-GENERAL.

Sir ROBERT MOUNSEY ROLFE, Knt.

NAMES OF CASES

REPORTED IN THIS VOLUME.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF KING'S BENCH,

AND BAIL COURT,

IN

Hilary Term, 1837.*

HAYWARD *v.* PHILLIPS.

King's Bench.

Jan. 11*th.*

AN action of covenant, upon an indenture of lease between these parties, in which several issues were joined, came on for trial at *Westminster*, on the 8th of *December*, 1835, when an order was made by consent:

That the jury should give a verdict for the plaintiff on the first issue, damages assessed on the first breach, 10*l.*, and costs, 40*s.*, subject to the award of a barrister, to whom the *cause and all matters in difference between the parties were referred, to order and determine what he should think fit to be done by the parties respecting the matters in dispute, and to direct what should be done between the parties except the cancellation of the lease;* that the costs of the cause should abide the event of the award, and that the costs of the reference and award should be in the discretion of the arbitrator, who should award by whom, to whom, and in what manner the same should be paid.

In *Hilary* term, on the 23rd day of *January*, 1836, the arbitrator published his award, the material parts of which were in the following terms:—"I do award, order, and adjudge that the verdict already entered up for the plaintiff on the first issue shall stand, and that the assessment of 10*l.* damages on the first breach shall also stand and I do award and determine that the defendant did not repair the said premises in manner and form as is alleged in the said plea to the second breach. *And I do award, order, and assess the damages which the plaintiff has sustained by reason thereof, at the sum of* 249*l.* 3*s.* And I

1. Where, by order of *nisi prius*, a verdict was taken for 10*l.* on one of several issues, subject to the award of an arbitrator, to whom the cause and all matters in difference were referred; and the arbitrator had ordered verdicts to be entered on three other issues also for 249*l.* 3*s.*, and 1*s.*, and 1*s.* respectively; the award, which contained no distinct order to pay, was set aside.

2. A motion to set aside the award under such reference may be made at any time, before the end of the term next after the publication of the award.

3. It is no objection to the rule, that it is drawn up upon reading the affidavit and paper writing annexed, if the affidavit refer to such paper writing as a true copy of the award.

4. The attendance of the attorney for the party, against whom the award was made, at the taxation of costs, without notice of objection to the award, and subsequent applications for time to pay its amount, are no waiver of the right to move to set it aside.

* *Littledale*, J. was absent through severe illness, from *Jan.* 16th to the end of this term.

do award and determine that the defendant did not paint the said premises in manner and form as is alleged in the said several pleas to the third breach. And I do award, order, and assess the damage which the plaintiff has sustained by reason thereof at 1*s*. And I do award and determine that the defendant did not repair, &c. And I do award, order, and assess the damages which the plaintiff has sustained by reason thereof at the sum of 1*s*. *For which said several sums of* 10*l*., 249*l*. 3*s*., 1*s*. *and* 1*s*., *amounting together to the sum of* 259*l*. 5*s*., *the verdict is to be for the plaintiff*, over and above his costs and charges by him expended about the said cause." *The award contained no direct order for the payment of the above sum.* Some matters in difference, not in issue in the cause, were adjudicated upon.

Judgment having being entered up in pursuance of the award, the defendant's attorney attended, the 2nd of *February*, at the taxation of costs, without making any objection to the proceedings; applied subsequently to the plaintiff for time to pay the amount of the judgment; and finally, obtained a judge's order for staying execution, on the terms of bringing the money into Court; which terms, however, were not complied with. After the first four days, but before the end of *Easter* term in the same year, Sir *W. Follett* obtained a rule *nisi* for setting aside the award. Several objections were taken to it, but those only are here mentioned which the Court referred to in giving its judgment.

The rule was drawn up, upon reading the affidavit of the defendant and the paper writing thereunto annexed, the affidavit stating the paper writing to contain, "as defendant verily believed, a true copy of the award of the arbitrator, the defendant having been served with the same by the attornies of the plaintiff." The rule having been enlarged,

Sir *J. Campbell*, A. G. and *J. Jervis* now showed cause.—This rule must be discharged. First, it is drawn up on reading the affidavit, and the paper writing annexed, instead of the award annexed, *Sherry* v. *Okes* (*a*). In the next place, this application is too late; it should have been made within the time allowed to motions for setting aside verdicts and for new trials. It will be said that the reference being not only of the cause, but also of all matters in difference, the defendant is entitled to the enlarged time given by 8 & 9 Will. 3, c. 15; namely, until the end of the term next after the publication of the award. That might be so if no verdict had been taken, but a verdict having been taken, the case is drawn within the period limited by the Court for disturbing verdicts. In *Rawsthorn* v. *Arnold* (*b*), the cause and all matters of difference were referred to an arbitrator by order of *Nisi Prius*. There the Court held the reference was not within the statute, but that the party seeking to disturb the decision of the arbitrator should, unless grounds for indulgence were shown, make his application within the first four days of term. [*Littledale*, J.—It has been decided that when the reference is made by order of *Nisi Prius*, it is not within the statute, but the Court is generally guided in its discretion by analogy to the statute.] [*Coleridge*, J.—In *Rawsthorn* v. *Arnold* when the application was made, even the time allowed by statute had gone by.] It is objected that the arbitrator has exceeded his authority in directing other verdicts in addition to that found by the jury, and in increasing the

(*a*) 1 Harr. & Woll., 119. (*b*) 6 B. & C., 629.

and that the award is therefore bad. But the arbitrator had in- nim unlimited powers "to direct what was to be done between the cept the cancellation of the lease." That is the only limit to his *Pearse* v. *Cameron* (*c*), *Prentice* v. *Reed* (*d*), *Bonner* v. *Charl-* ll be cited on the other side. In all those cases the verdict was he trial, and the damages taken on the whole declaration. Here was found on one issue only. The arbitrator has not disturbed has he increased the amount of damages for which it was taken. last of the above cases the cause itself was not referred, but only t of damages. The award at all events is good in part, and not void

plication is, moreover, contrary to good faith. There have been ict waivers on the part of the defendant of any irregularity in the s under the reference; one on the taxation of costs; a second in tion for time; and a third in taking out the Judge's order.

Follett in support of the rule. The preliminary objection to the e rule is, that it is drawn up on reading the affidavit and paper nexed, instead of the award annexed, and *Sherry* v. *Okes* is relied t in that case there was nothing in the affidavit to show the paper nexed to be the award; here the paper writing is distinctly referred ue copy of the award."—The next objection is, that the application ndant is out of time, according to *Rawsthorn* v. *Arnold*. The cir- s of that case have been already distinguished from the present; the e was made in *December*, the motion not until *Easter* Term; and the n made by Lord *Tenterden* as to the time of coming to set aside an ere the cause and all matters in difference are referred by order of *Nisi* l be found to be extra-judicial. We are within the time given by the ich applies where the reference is not only of the cause but of matters in out of the cause (*f*), *Allenby* v. *Proudlock*: in which case *Coleridge*, all the authorities on the subject.—The objections to the award are, s beyond the arbitrator's jurisdiction in increasing the damages, and g verdicts on other issues besides the first. In *Bonner* v. *Charlton*, was taken for 30*l*., and the arbitrator awarded 70*l*. Lord *Ellen-* here observes, "The verdict was taken at the trial for 30*l*. subject rd of an arbitrator; he had therefore a limited jurisdiction within nt, to assess the damages which, upon investigation, he should find plaintiff had sustained; but he had no authority to exceed that The damages found by the jury may, in this respect, be compared ages laid in the declaration; they operated as a limit to the discre- e arbitrator, in like manner as the jury are limited by those laid in ation." The same principle is recognised in *Prentice* v. *Reed*, and v. *Cameron*: in which latter case, the same learned Judge, after that the arbitrator could not in his award go beyond the amount of t, adds, "yet, as all matters of difference were referred to him, he rhaps, make his award for a larger sum as to those additional mat- red to him; for which, though the party would not have a remedy

& S. 675.
unt. 151.

(*e*) 5 East, 139.
(*f*) 1 Harr. & Woll. 357.

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under the verdict, he might have a remedy under the award. As far as respected the cause, the smallness of the sum might have been an inducement to the other party to submit to the reference." Here no complaint is made of the amount of damages awarded, in respect of any matter in difference out of the cause. The complaint is, that the sum of 249*l.* 3*s.* has been awarded upon an issue in the cause, although the verdict was only for 10*l.* It is true, this verdict was taken upon a different issue from that upon which 249*l.* 3*s.* has been assessed; but it forms, notwithstanding, the general limit within which the aggregate amount of damages upon all matters in issue in the cause must be confined. The damages awarded are an entire sum, and the Court has no data for reducing the excess. The award is therefore bad altogether.

But even if the damages had not been increased, the direction, that other verdicts shall be entered up in addition to the verdict taken at the trial, invalidates the award. No such power is given to the arbitrator by the terms of the reference; and the Court will not allow him to assume the functions of the jury without the consent of the parties. In *Hutchinson* v. *Blackwell* (*g*), it was held that a submission to leave "the cause and the subject matter thereof, and the issue therein, and the costs of the action," to the determination of an arbitrator, did not authorise him to order a verdict to be entered. *Donlan* v. *Brett* (*h*), overruling *Cartwright* v. *Blackworth* (*i*), is to the same effect. [*Coleridge*, J.— Here the jury have found a verdict on one issue only.] That is conclusive to show there was no intention that a verdict should be entered on any other. The defendant might have agreed to the reference on the faith of the verdict being on one issue only. It would, therefore, be a hardship upon him afterwards to have judgment and execution on all the other issues enforced against him. [*Coleridge*, J. —The arbitrator might have awarded how much was to be paid on each issue. You complain merely of his ordering a verdict for that amount. Is not the award good to a certain point, and bad only as to the excess?] It is bad altogether, *Donlan* v. *Brett*. In that case it was contended in support of the award, that ordering a verdict to be entered for the plaintiff for a certain sum was tantamount to an order that the defendant should pay so much to the plaintiff; but the Court decided otherwise. Here, also, the award, containing no order to pay, the verdict, which is wholly unauthorised, cannot be considered merely as excess. [Lord DENMAN, C. J.—Is there no mode of getting the money except through the verdict?] There is not.

Lastly, the conduct of the defendant does not amount to a waiver. He endeavoured to gain time; but the opposite party has not been prejudiced by anything he has done.

Lord DENMAN, C. J.—There is no direct award to pay the amount of damages assessed; nor is there any mode by which it can be recovered except through the verdict. The case of *Donlan* v. *Brett* is conclusive to show that the party referring the cause and all matters in difference does not therefore, without express terms, empower the arbitrator to order a verdict to be entered up against him. The award cannot be sustained, and the rule must be made absolute.

(*g*) 8 Bingh. 331. (*h*) 2 Ad. and Ell. 344. (*i*) 1 Dowl. P. C. 489.

LITTLEDALE, J.—I am of the same opinion. In *Bonner* v. *Charlton*, it is held that the arbitrator had no authority to award a larger sum than that r which the verdict was taken at the trial, and there are several other cases the same effect.

As to the time within which the application is to be made, I agree in the stinction that, when a cause and all matters in difference are referred, party need not come within the first four days of term. Such a case is t perhaps strictly within the statute of William; yet the Courts, having gard to the matters in difference, which are part of the subject referred, ay be guided in their discretion by analogy to that statute, and entertain e application at any time before the end of the term next after making the ward. It has been contended, that a verdict having been taken, the prac-e of the Court, as to the time allowed for disturbing a verdict, should ntrol the time allowed by the statute for disturbing an award. In this I not concur. The one limitation results merely from a regulation of the ourts; the other from the express words of an act of parliament. The ward must be set aside.

WILLIAMS, J.—The parties might have enlarged the authority of the bitrator if they had thought proper, but they have not done so; and he eing restricted by the order of reference to a particular amount, has un-estionably exceeded his authority and vitiated his award, by going beyond at amount. I agree, therefore, that this rule must be made absolute.

COLERIDGE, J.—As I understand the facts, the award contains no order pay; nor does it afford any means, except the verdict, of reaching the amages assessed. I think the authority of *Donlan* v. *Brett* quite decisive, showing, First, that the arbitrator had no right to order a verdict to be ntered without having express authority for that purpose; and, Secondly, hat if he do so, such order cannot be taken as an indirect order for payment f the sum found due.

As to the application being in time or otherwise, I think it is not neces-ary for a party to come within the first four days of term, except in those ases in which, the submission being of the cause alone, the arbitrator is in rinciple merely substituted for the jury, and his award for their verdict. he same principle does not apply where the submission is not of matters n the cause only, but also of all other matters in dispute out of the cause.

The remaining objection to this rule is, that there has been a waiver by the efendant of all irregularity. It seems that the attorney for the defendant ttended at the taxation of costs, and under the pressure of the circumstances ade the best terms he could for the purpose of staying the execution, and hat he gave no notice of his intention to endeavour to set aside the award. However, I do not think that his conduct amounted to what can be satisfac-orily considered as a waiver of his right to object to the award.

Rule absolute for setting aside the award (*k*).

(*k*) As to the period within which a party must move to set aside the award, where he cause and all matters in difference are referred. *see* a case *contrà* in the Common Pleas, *Lyng* v. *Sutton*, 2 Hodges, 106; where that Court decided that the motion must be made within the first four days of Term.

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Jan. 12th.

The KING *v.* the Justices of Suffolk.

(St. Andrew Ilketshall *v.* Chediston.)

Where on appeal to sessions against an order of removal, the Justices quashed the order, but on application granted a case, this Court discharged with costs a rule for a mandamus to them to hear the appeal.

AN appeal by the churchwardens and overseers of St. Andrew Ilketshall, in Suffolk, against an order for the removal of a pauper from Chediston in the same county, came on for hearing at the Epiphany Sessions 1836, for the Beccles division of the county. Copies of the order of removal, and of the examination of the pauper touching her settlement were served upon the appellant parish. But no copy was so served of the examination of the overseer to the respondent parish, touching the chargeability of the pauper. The appellants stated the non-service of such copy, as one of their grounds of appeal; and having put in their notice of appeal at the trial, objected, on the same ground, to the respondents proceeding with their case. The Court allowed the objection and quashed the order, but granted a case on this point (viz.), whether it was necessary to state the chargeability of the pauper in the examinations sent, when the chargeability appeared, and was sufficiently set forth in the order sent with the examination; a rule *nisi* having been afterwards obtained on the same point, for a mandamus to the justices, to enter continuances and hear the appeal.

Biggs Andrews showed cause. The justices have granted a case. That of itself is a sufficient reason why the rule for a mandamus to them should be discharged. *Rex* v. *The Justices of the West Riding* (*a*), is conclusive upon the point. They should have followed up their case. (He was then stopped).

Austin in support of the rule. The question turns upon the construction of sections 79 & 81 of the Poor Law Amendment Act (*b*). The chargeability of the pauper was sufficiently set out in the copy served of the order of removal. That is all that is required. Sect. 79 does no more than confine the contending parishes at the trial to the grounds set forth in the "order, examination, or statement." The requirement of the statute is satisfied therefore if the chargeability appear *either in the examination or the order.* [Lord DENMAN, C. J.—How do you distinguish the present case from *Rex* v. *the Justices of the West Riding?*] The point made in that case was a mere point of practice, namely, that no notice had been given of the trial of the respited appeal. Lord *Denman* in that case expresses himself to be "unwilling to interfere with the practice of the Courts below." Here the Court is called upon to construe an act of Parliament.

Lord DENMAN, C. J.—I do not think the Court meant to proceed on that distinction. It seems quite unreasonable. The respondents must have applied for the case when it was granted. If they had not so applied, or had even refused a case offered by the sessions without application, they might perhaps come here for a mandamus. But it is quite impossible to allow that the two modes of reviewing the judgment of sessions should both be put in

(*a*) 1 Ad. & Ell. 606. (*b*) 4 & 5 W. 4, c. 76.

The election has been made, and this rule must be discharged
ts.

est of the Court concurred (*c*).

Rule discharged with costs (*d*).

ledale, J., Williams, J., and Cole-
the last day of this term a similar rule in *Rex* v. *the Justices of Northampton* was disposed of in the same manner.

The KING *v.* GARDNER.

Jan. 12th.

for a mandamus to the defendant, as one of the coroners for the nty of Lancaster, commanding him to review his taxation of the osts of *J. J. Norreys*, in respect of an inquisition taken before the oner [under 4 W. 4, c. 25 (local, personal, public), an act or uniting the Wigan Branch Railway Company and the Preston an Railway Company, for authorizing an alteration to be made in of the last-mentioned railway, and for repealing, altering, and g the act relating to the said railways], *and to allow such costs as lly allowed to the successful party in trials of civil causes in the King's Bench.*

On an inquiry before a jury, to assess compensation for lands taken by a Company under a Railway Act, the words in the act "costs of taking the verdict" do not include fees to counsel, attorney, or surveyor

ct empowered the company to purchase lands, &c.; and in case of ment with the owners of such lands concerning the compensation d for them, to summon a jury for the purpose of assessing such ation (*a*).

rsuance of the powers given them by the above act, the company vith Mr. Norreys for the purchase of lands belonging to him; and, nable to agree with him as to the terms of the purchase, summoned assess the amount of compensation to be paid for the land. The ing awarded to him a larger sum than had been offered by the com-

.66. Provided that in the inquiry Jury, the "*person claiming com-shall always be deemed to be plaintiff, d to the same rights and privileges s in actions at law are entitled to.*"

. That in every case in which ct of a jury shall be given for a m than shall have been previously y the said company for the pur-any lands, to be used or taken by the purposes of this act, or as tion or satisfaction for any da-loss which may happen or arise in tion of any of the powers hereby all the *costs of summoning such the expenses of witnesses*, shall be by the said company, and such expenses shall be settled and d by the said sheriff, under-sheriff, r other person as aforesaid; but dict of the jury shall be given for the same or a less sum than shall have been previously offered by the said company, one moiety of the said costs and expenses shall be defrayed by the party with whom the said company shall have such controversy, and the remainder shall be defrayed by the said company.

Sec. 72. That all parties with whom the said company shall have any dispute shall, at their own costs, *before the said company shall be obliged to issue their warrant for the summoning of such jury, enter into a bond, with two sufficient sureties, to the said company, in a penalty of one hundred pounds, to prosecute their complaint, and to bear and pay their proportion of the costs and expenses of summoning and returning such jury and taking such verdict, and of the summoning and attendance of witnesses, in case any part of such costs and expenses shall fall upon them.*

pany, he claimed to be allowed on taxation the full costs incurred by him in respect of the inquiry; and the coroner having disallowed the fees for counsel, attorney, and surveyor, the above rule was obtained.

Cowling showed cause.—Acts giving costs are of a penal nature, and to be construed strictly: *Murray* v. *Nicholls* (*b*). Sec. 71 uses clear language, and speaks of no costs, except those of "summoning such jury, and the expenses of witnesses." Sec. 72, which was introduced merely *ex majori cautela*, to secure payment of costs, cannot effect that clear language. At most, the latter section can only be used for the purpose of explaining the former; it cannot mean the whole costs of the trial; for, if it be so construed, the words "summoning the jury, &c.," might have been omitted. "Costs of taking such verdict" may signify the costs of the coroner and those of his officers. In *Rex* v. *the Justices of York* (*c*), the words were more comprehensive—"the costs and expenses of such notices, precepts, and of summoning and returning such jury and witnesses, *and also of the said inquest.*" Here the words are not "of such verdict," but "of taking such verdict."

Sec. 66, which says, that the party seeking compensation shall be deemed to be plaintiff, and entitled to the rights and privileges of a plaintiff, was intended to regulate the proceedings at the trial, as by giving the claimant the right to begin and to reply; and not to regulate the allowance of costs, which the plaintiff in actions at law is not in all instances entitled to, merely because he obtains a verdict.

The counsel's and attorney's fees were properly disallowed. There is no pretence for claiming the fees paid to the surveyor; they were disallowed in the case cited. The Court will not direct a mandamus unless it see clearly that the coroner has been in error.

Coltman in support of the rule.—The words of the act relating to costs should receive a liberal construction. They are the words of the company who framed the act; and, if a narrow construction be put upon them, the interests of the public will be wholly unprotected. The statute of Gloucester (*d*) gives only "the costs of the writ purchased;" yet it has always been held to comprehend the general costs of the action.

Sec. 66 invests the claimant with all the rights and privileges of a plaintiff in an action at law; one of those rights and privileges is, that when successful at the trial, he shall have his costs, except in certain cases, in their nature out of the purview of this act, where he recovers less than 40*s*.

Sec. 71 gives power to tax costs; Sec. 72 does not. The meaning of the latter clause may be, that certain additional costs, which are not subject to taxation, shall also be allowed. No substantial operation is given by the argument on the other side to the words "of taking such verdict;" nor has any intelligible distinction been pointed out between them, and the words "of such inquest," which in the *King* v. *the Justices of York* were held to carry the general costs of the trial.

Lord DENMAN, C. J. I have no difficulty in saying that, if I could find

(*b*) 6 King. 530. (*c*) 1 Ad. & Ell. 828. (*d*) 6 Ed. 1, c. 1, s. 2.

any words in the act that would warrant the allowance of fees to counsel and attorney, I would give them the largest sense which words can possibly receive; and I think it exceedingly unjust that the fees in question should not be provided for. Still, if they are not provided for in the act itself, we cannot supply that which the legislature has omitted. It seems to me that the particular costs enumerated in the sections which have been read fall short of the costs which it is the object of this rule to recover. I am not aware that we strained the words in the *King* v. *York* beyond the signification which they fairly admitted of. The word "inquest," in that case, is susceptible of the meaning "trial" or "inquiry," and therefore capable of extending to all the costs necessary to such trial or inquiry. With regard to the words "giving to the party all the privileges of a plaintiff in an action," I think they are not meant to give him any right to costs; because he is to enjoy these privileges equally whether successful or not; whereas the quantum of costs to be allowed him is made to depend upon the event of the trial. The words seem to me to have no other object in view than the regulation of the course of proceeding, by giving him the right to begin and to reply.

LITTLEDALE, J.—I entirely concur upon both points. A plaintiff at law has no uniform right to costs, merely because he has got the verdict; the right varies, according to the subject matter and form of the action, and is limited in some instances to the amount of damages recovered. As to sections 71 and 72, it is to be lamented that the same latitude cannot be given to them as to the sections relied upon in *Rex* v. *York*. In both acts, perhaps, the intention of the legislature was the same, but they have used different phrases. The word "inquest" very well bears to be interpreted, as trial generally; but "taking the verdict" is one only out of many proceedings which constitute the trial.

WILLIAMS, J.—Had this act contained any generality of expression on the subject of costs, I should have been disposed to say that the costs contended for by Mr. *Coltman* ought to be allowed. But unfortunately it contains little else but an enumeration of minor particulars; as, in section 71, "the costs of summoning the jury and witnesses." Section 72 has the more enlarged words, "costs and expenses of taking the verdict;" but they do not stand alone; they are coupled with the two other particulars mentioned, and to be construed in connexion with them.

COLERIDGE, J.—Mr. *Coltman's* claim cannot be put upon higher grounds than it would rest upon if the material words of the 72nd section were read in section 71. We are then asked to allow the fees of counsel and attorney on the ground, that by the words, "costs of taking the verdict," are comprehended all the costs of the trial. I conceive that you cannot, according to the ordinary rules of construction, give that meaning to the words, standing as they do, between the words "summoning the jury" and "summoning the witnesses." As to the observation about the liberal construction, which the statute of *Gloucester* has always received, a well known distinction prevails between old acts of Parliament and modern ones. The old acts are very short, and employ very general terms, to which, therefore, it has been considered necessary to give a very extensive signification, so as to make them

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embrace all particulars which will fall within them; but in modern times, the legislature has adopted the use of a great number of particular terms, to which common sense requires us to apply a very different rule of construction.

Rule discharged.

EMPSON *v.* FAIRFORD.

Jan. 12th.
In an action of libel, where the meaning of the publication proved is not beyond all question, the jury may put their own construction, and find for the defendant, although the judge give them his decided opinion that the publication is libellous.

ACTION for libel. Plea general issue.—On the trial at *Guildhall*, the sittings after last *Michaelmas* Term, Lord *Denman*, C. J. expressed to the jury his decided opinion, that the publication was libellous; but the jury, notwithstanding, found a verdict for the defendant.

Bompas, Serjt., now moved for a new trial, on the ground of the verdict being against evidence. A publication, which, according to the direction of the learned judge, was libellous, having been proved, nothing remained for the jury but to assess the damages which the plaintiff had sustained. Lord *Erskine's* Act (*a*), applies to criminal cases only. In *Levi* v. *Milne* (*b*), *Best*, C. J., says, "Has a jury then a right to act against the opinion of the judge, and to return a verdict on their own construction of the law? I am clearly of opinion that they have not." He cited also *Haire* v. *Wilson* (*c*).

Lord DENMAN, C. J.—I did not tell the jury, in the way of direction, that the publication was a libel, and that they must find a verdict for the plaintiff; nor was it desired that I should do so. There was a discussion as to the meaning of several passages in the libel. I thought they were libellous, and expressed my opinion to the jury, but they were not bound to follow it. When the meaning of the publication is so much involved in the question of libel or no libel, I do not see how the question can be withdrawn from their consideration. Suppose a series of inuendoes had run through the declaration, it must have been left to the jury to say if they were proved.

LITTLEDALE, J. concurred.

WILLIAMS, J.—The judge can only tell the jury that, if they understand the publication in a particular sense, it is a libel. The judge may tell them what is the legal result of a particular construction. But the construction is for them.

COLERIDGE, J.—It is a question of fact for the jury, whether an expression convey a particular meaning or intention. That cannot be withdrawn from them, and, until it is settled, no question of law can arise.

Rule refused.

(*a*) 32 G. 3, c. 60. (*b*) 4 Bingh. 195. (*c*) 9 B. & C. 643.

BROWN *v.* THORNTON.

Jan. 16th.

By the custom of Batavia, parties about to enter into a contract go before a notary public, who after inscribing in a book the contract signed by them, gives them each a copy. A copy may also be obtained at any time afterwards by either party in the absence of the other. These copies, in all countries subject to the Dutch law, except at Batavia, where the notary's book must be produced, are valid evidence of the contract.

Held, 1st, That a copy duly authenticated under the hand and seal of the notary, but not identified as one of those delivered at the time of making the contract, nor proved to have been examined with the entry in the notary's book, was not evidence of the charter party.

2ndly, That the defendant's admission, that the goods had been duly conveyed, such admission containing in its terms a reference to the charter-party, did not entitle the plaintiff to a verdict on the common count, even for nominal damages, without proof of the charter-party.

ASSUMPSIT.—Count for freight and carriage of goods from *Batavia* to *Antwerp*. Count on a charter-party. Common count for carriage of goods. Plea, the general issue. At the trial before Lord *Denman*, at the sittings after *Trinity* Term, 1835, it was proved, in support of the plaintiff's case, that the charter-party was entered into at *Batavia* before a notary-public, according to the usage of the *Dutch* colonies. The bill of lading was produced "To *Richard Thornton* or his assigns, *he or they paying freight as per charter-party*." The defendant's answer to a bill of discovery, filed against him in the Court of Chancery, was also put in evidence; by which answer and by certain letters annexed thereto, he admitted in effect the shipment of the cargo with his sanction; that he was its consignee, and that part of it had been duly received. *The answer, however, and the letters contained a reference to the charter-party.* With regard to the charter-party, the following evidence was given. According to the *Dutch* law prevailing at *Batavia*, parties about to enter into a contract go before a notary, who subscribes the contract in a book kept for that purpose, which is then signed by the parties. He makes out from this book copies of the contract and delivers them to the parties. His signature to the copies is proved before the first chief of the government; and, except in *Batavia*, where the Courts require the book itself to be produced in evidence, these copies are, in all countries subject to *Dutch* law, admissible in the first instance as the proper evidence to the contract. A subsequent copy may also be obtained, at any time afterwards, by either party, in the absence of the other; which subsequent copy has the same credit given to it as either of the copies first delivered. A document proved to be in the hand-writing of the notary at *Batavia*, and sealed with his official seal, was received in evidence as a copy of the charter-party. It did not appear in what manner, or at what time this document was obtained. A verdict was given for the plaintiff for the full amount of freight at the rate of 3*l.* 10*s.* a ton; but the learned judge gave leave to the defendant to move for a nonsuit to be entered, in case the Court should consider the document in question to have been improperly received, on the ground that it was not proved to have been examined with the original.

A rule *nisi* having been obtained,

The *Attorney-General* and *W. H. Watson* showed cause. There is no ground for entering a nonsuit, even if the instrument received in evidence were not admissible to support the count on the charter-party. The declaration contains a count in *indebitatus assumpsit* for freight, and to a verdict upon this count no proof of the instrument ascertaining the sum to be paid for freight is at all necessary. Take away all the evidence relating to the charter-party; still the admission by the defendant, in his answer in Chancery, that he received the goods under the bill of lading, is alone sufficient to entitle the plaintiff on the common count to a verdict for nominal damages. Nor was proof of the charter-party necessary to establish this claim even to the whole amount sought to be recovered. The answer admitted enough of the contents of the charter-party to show the rate of freight agreed upon;

namely, 3*l.* 10*s.* a ton; and the letters annexed to the answer are to the same effect.

But suppose this view of the question to be incorrect, the copy made by the notary of the charter-party was properly received in evidence. It is either a duplicate original, or a copy made by the notary as the agent of both parties properly authorized to deliver such copy. The bought and sold notes of a broker in this country are originals binding on the parties, on the ground that he is the agent appointed by them to make these notes. So, here, the copies of the charter-party delivered by the notary are binding, because he also is the agent of the parties. They go before him and appoint him as their mutual agent, for the purpose of preparing these documents. At all events, if they do not themselves specially appoint him, he is appointed for them by the *lex loci*.

The law of Batavia makes these documents binding upon the parties in that country. They will therefore be enforced here; and the question does not depend on any rule of evidence, but on what is the *lex loci*. The cases of *Appleton* v. Lord *Braybrook*, and *Black* v. Lord *Braybrook* (*a*), may be cited on the other side; but an obvious difference exists between them and the present case. They were actions on judgments obtained in Jamaica. In the first case the instrument produced to authenticate the judgment was not proved to be in the handwriting of the party authorized to supply such documents, nor was it sealed. In the second case the instrument produced was not sealed. So that in neither case could the instruments be considered as exemplifications of the originals. They were merely a species of office copies receivable in Jamaica, in the same manner as office copies are receivable here, when a question arises in the same Court. These objections do not apply in the present case. It is not contended that this copy is admissible in this country on the same grounds on which it would be admissible in Batavia, but on this ground—that the notary being by the consent of the parties, or by the law of Batavia, or by both, appointed the agent of such parties, his act, in signing and sealing the instrument, must be held to be the act of the parties themselves.

Creswell, contrà.—The plaintiff could not entitle himself even to nominal damages without either producing the charter-party, or giving such secondary evidence of its contents as is required by the laws of this country. The bill of lading *per se* was insufficient, because by referring to the charter-party as the real contract between the parties, it makes some evidence of that contract indispensable. Suppose the charter-party to have contained a clause that the value of any goods lost should be deducted from the amount of the freight, and that in point of fact goods had been lost of such value, that nothing at all remained due for freight, would the plaintiff under these circumstances have any right to nominal damages? Nor can the admissions of the defendant in his answer in Chancery supply the defect. The same objection recurs; they also refer to the charter-party, and make therefore evidence of its contents material to a full knowledge of the transaction between the parties.

This is a mere question of evidence to be decided by the rules of evidence of this country. Was the notarial copy legitimate evidence of the charter-

(*a*) 2 Stark. C. 7, & 6 M. & S. 34 & 39, S. C.

irty? It is not a duplicate original made by the notary as agent for both irties. The original is signed by the parties, the copy not signed; and in atavia, the original in the notary's book must be produced. The parties go efore the notary, not as being their mutual agent, but in compliance with e usage of the country. He gives out copies to either party at any subse- ent time and in the absence of the other. How or when the copy in ques- on was procured did not appear. As to the bought and sold note of a roker, it differs entirely; it is itself the original contract, of which the entry his book would at most be only secondary evidence (*b*).

Was then the copy properly received as secondary evidence, according to he laws of this country? Foreign judgments, in order to be enforced here, nust be authenticated according to the known rules of evidence prevailing in ur courts, *Appleton* v. Lord *Braybrook*, *Black* v. Lord *Braybrook*, and *likes* v. *Bunbury* (*c*). The result of *Appleton* v. Lord *Braybrook* is, that his Court rejected as evidence of a judgment in Jamaica a copy which would ave been admissible as evidence in that country. The reception of the otarial copy in evidence cannot be justified, on the ground that the title of he parties, and the proceedings themselves would be incomplete until a opy had been delivered, as in the instances of a chirograph of a fine (*d*), nd a copyholder's copy of the court roll. The indorsement on a deed of the ay of its enrolment is also different. The indorsement is itself the record e). Nor can it be contended that the copy was given out by a public officer uthorized to issue authenticated copies. A copy made by a public officer in is country has no intrinsic validity, unless the officer be authorized by the 'ourts to give out the copy. The notary is not authorized by the Courts, but nerely by the usage of the country. [*Coleridge*, J.—Is he not authorized y the agreement of both parties that he shall be their agent?] Such an greement is implied only from the usage of Batavia. There has been no roof of any special agreement between the parties to make him their agent, r to waive the rules of evidence in this country, and to be bound by a copy roduced. In the absence therefore of the original, an examined copy would ave been the legitimate mode of proof, and any other copy was improperly eceived.

R. V. Richards, on the same side, was stopped.

Lord DENMAN, C. J.—I think it quite clear that the plaintiff could only re- over by proof of the charter-party; for although the declaration contains the ommon count for freight, its amount and mode of payment cannot be ascer- ained except by reference to the charter-party, which document is also referred o by the letters and answer of the defendant in the Court of *Chancery*. Some roof therefore of the charter-party, which could not be produced, being neces- ary, was the proof given at the trial sufficient? The original instrument, signed by the parties, is in the notary's book at *Batavia*; he is authorized to give out copies to them, to which copies, in all countries subject to the *Dutch* law, ex- cept at *Batavia*, where the original itself must be produced, full faith is given. From this, however, it does not appear that they are considered in them-

(*b*) See *Thornton* v. *Meux*, 1 M. & M. 43.
(*c*) 4 Camp. 28.
(*d*) Plowd. 410.
(*e*) *Rex* v. *Hopper*, 3 Price, 495.

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selves as the binding documents between the parties, but merely that the Courts will receive them as legitimate instruments of proof in the absence of the original. It occurred to me at the trial that the notary might be looked upon as an officer, elected by the parties themselves, for the purpose of giving out copies, by which they would be bound. If the copy in evidence had been identified as one of those delivered at the time of entering into the contract, this view of the case might be correct; but it appears that copies may be delivered at any time, and that they do not on that account receive the less credit in the *Dutch* Courts. Here the copy may have been taken out within six months of the trial. It is clear, then, that it is the force of the *Dutch* law alone that gives it any value it may have in the *Dutch* Courts, and that on grounds which cannot be adopted by the Courts of this country. The cases of *Appleton* v. Lord *Braybrook* and *Black* v. Lord *Braybrook* are authorities that these Courts will not borrow a rule of evidence from the practice of foreign Courts; nor, as Mr. *Cresswell* has observed, can we say that the parties have agreed to waive any objections that might be offered, in any other than the *Dutch* Courts, to the admissibility of these copies in evidence. The rule for a nonsuit, therefore, must be made absolute.

WILLIAMS, J.—I am of the same opinion. I was at first strongly impressed by the argument of the *Attorney-General*, that the notary must be considered, as it were, the agent of both parties, for the purpose of giving out this copy. However, it seems to me, on further consideration, that this view of the case is incorrect. The parties go before the notary, in conformity to the usage of the place where the contract is entered into. But they make no special agreement to extend the validity of the document, as an instrument of evidence in any foreign country. The entry in the notary's book is the real and original contract, and the question is, whether that contract was authenticated at the trial, according to our rules of law. It was not shown, on behalf of the plaintiff, that the notary is authorized by the Courts in *Batavia*, as their officer, to give out copies of any contract made before him. No analogy, therefore, between the copy in this case, and the chirograph of a fine, can be maintained. In *Buller's* 'Nisi Prius' a different reason from that suggested in Mr. *Cresswell's* argument is assigned for admitting the chirograph in evidence. It is there said to be admissible because the officer is authorized by the Court to deliver out the chirograph; and further, that where the fine is levied with proclamations, that they must be proved by an examined copy of the roll. Why? Because the chirographer is *not* authorized to make out copies of the proclamations, and therefore his indorsement on the back of the fine is not evidence of them (*f*). Then it is said, that in the answer and letters of the defendant, certain admissions are made that the charter-party was entered into, and that the freight was to be paid at the rate of 3*l.* 10*s.* a ton, and that consequently the claim of the plaintiff to a verdict was completely established. But these admissions all contain some allusion to the charter-party as the foundation of the transaction. Evidence, then, of the charter-party was absolutely requisite; and it seems to me, for the reasons I have mentioned, that no such evidence was produced. I agree that a nonsuit should be entered.

(*f*) B. N. P., 229.

COLERIDGE, J.—It appears to me that the plaintiff could not maintain this ction without giving some legitimate evidence of the charter-party. That rings before the Court a question merely of evidence, which must be decided ccording to the rules of evidence prevailing here, although it relate to a ansaction in a foreign country. In the first place, it was contended, and if at point had been made out, everything would have been made out, that in uth the document received as evidence of the charter-party was not a copy, ut the original binding contract. I think that this will not appear to be e case when all the facts are considered. The parties to the contract go efore a notary-public, who makes in his book an entry, which they sign; and e, either at that time or at any future time, in the presence, or not in the resence of the parties, gives out copies of the entry to either of them. The ocument in question is one of those copies, but delivered we do not know nder what circumstances, or whether in the presence of the parties or not. rom these facts, it seems to me clear that the original contract between the rties is that which they have signed in the book of the notary-public. Then e original contract not having been produced, and being necessarily beond the control of the plaintiff, it is not denied that secondary evidence of its ntents was admissible. Now has the proper secondary evidence been iven? Certainly not according to the regular rule applicable to such a se—by the production of a copy examined with the original. But it is ught to be made so in one of two ways; first, that it is a copy issued by a blic officer of the Courts at *Batavia*. But it has not been shown that they ve intrusted to the notary any such power. Secondly, that it is issued by a rson authorized between the parties themselves. I think, however, the evience upon that point amounted to no more than this: that a copy has been btained according to the ordinary course of proceeding in *Batavia*, which opy, in any other country governed by the *Dutch* law, would receive the me degree of credit as the original itself, but which it could never have en supposed would have the effect given to it, of superseding the rules of idence in this or any other country where the *Dutch* law does not prevail.

Rule absolute for entering a nonsuit.

HODGKINSON *v.* MAYER.

Jan. 17th.

37 G. 3, c. 90, s. 31, rendering null and void the admission of an attorney who neglects to renew his certificate, does not apply to County Courts; and render an attorney who has once been duly admitted, but has not renewed his certificate, liable to the penalty of 12 G. 2, c. 13, s. 7, for practising in such Courts without admission.

)EBT for 20*l.* penalty under 12 G. 2, c. 13, s. 7, against the defendant for commencing an action the 18th *September*, 1834, in the County Court f *Stafford*, he not being then legally admitted an attorney or solicitor accordg to 2 G. 2, c. 23. On the trial before Lord *Denman*, at the *Staffordshire* ummer Assizes, 1835, it appeared that the defendant had commenced an ction on the day alleged, in the County Court, as attorney for one *Adams*; hat he was duly admitted as an attorney in Easter Term, 1828, but that he ad not taken out any certificate for the years 1833, 1834, and 1835. The nly question was, whether the 37 G. 3, c. 90, s. 31, making the admission f attornies, who neglect to renew their certificate, "null and void," the efendant could be said to have practised in this instance without admission.

King's Bench.

Hammerton v. Mertz.

A verdict having been taken for the plaintiff, with liberty for the defendant to move to enter a nonsuit, and a rule granted accordingly:

Ludlow, Serjt., showed cause.—2 G. 2, c. 23. "An Act for the better regulation of attornies and solicitors," prohibits, under penalty, persons who have not been sworn, admitted, and enrolled, from conducting suits in certain courts of law. This act did not extend to County Courts. Afterwards 12 G. 2, c. 13, an act (*inter alia*) for "continuing, explaining, and amending" the last act, enacted, that if any person practise in the County Courts of England, "who is not or shall not then be legally admitted an attorney or solicitor, according to the said act made in the second year of the reign of his present majesty, that such person shall for every such offence forfeit the sum of 20*l*., to be recovered with costs by any person who shall sue for the same." Was the defendant then, *September* 18, 1834, legally admitted? He was not; for he had neglected to take out his certificate "for the space of one whole year;" and thus, by 37 G. 3, c. 90, s. 31, rendered his admission in 1828 "null and void." The same section of the last-mentioned act contains the proviso for the readmission of a person who has so omitted to renew his certificate. This necessity of readmission is enough to show that the original admission is *ipso facto* vacated, and as if it had never been. Nor is the readmission a matter of course; it depends upon the conduct of the party during the interval, in which his character of attorney has been, to say the least, suspended; it may be granted on payment of a heavy penalty; it may be refused altogether. The cases mentioned on moving for this rule are beside the point. *Cross* v. *Kaye* (*a*), was an action on 25 G. 3, c. 80, s. 7, which gives penalties against attornies practising in Courts holding pleas to the amount of 40*s*. or more; and the only decision in that case was, that the act did not extend to an attorney suing in the Sheriff's Court by writ of *justicies*, for more than 40*s*. But that act did not make the admission of an uncertificated attorney "null and void;" so that the point now contended for did not arise. In *Jones* v. *Stephens* (*b*), a point certainly was raised on 37 G. 3, but the decision upon it amounts to no more than this, that the plaintiff, although he had not taken out his certificate, might sue for damages sustained in his character of an attorney, where *the libel itself*, for which the action was brought, imputed improper conduct to him *in his character of attorney*. The other case mentioned, "*In the matter of Hodgson and Ross*," (*c*) was an application on 22 G. 3, c. 46, s. 11, to strike one of the parties off the roll of attornies, for permitting the other, who remained uncertificated more than a year, to practise in his name; and to commit the other to prison. It is true the question turned, as here, upon the effect to be given to the words "null and void," in 37 G. 3. But the object of the application was highly penal, and the judgment of the Court at all events did not impugn the authority of *Slack* v. *Wilkins* (*d*). In this last case, which was on s. 12 of 22 G. 3, the enrolment of the attorney, who had practised at Quarter Sessions without certificate, was considered as set aside by the retrospective operation of 37 G. 3, and a penalty of 50*l*. was therefore enforced against him as a person not duly admitted and enrolled. Suppose the defendant, after having been

(*a*) 6 T. R. 663.
(*b*) 11 Price, 235.
(*c*) 3 Ad & Ell. 224, S. C. 1 Har. & Woll. 265.
(*d*) 1 Cr. & M. 23.

ertificated for twenty or thirty years, had practised in this Court, he would irly be liable. He has in fact continued uncertificated for three years, l has practised in a County Court. But the principle is the same in either e; and in *Ex parte Flint* (*a*), Lord *Tenterden* was clearly of opinion that G. 2, c. 13, s. 9, which says that no attorney during confinement in prison ll prosecute actions in law or equity, applied to County Courts as well as superior Courts. The statute upon which this action is brought is highly eficial to the public, and to be construed liberally for their protection.

Sir *W. W. Follett*, *contrà*.—The defendant is entitled to have a nonsuit ered. At the time the act passed, on which this action is grounded, no tificate was necessary to enable an attorney to practise. The only want of lification, therefore, that could be considered as rendering a party liable to penalty in question, must have been the want of the qualification of that e—namely, the clerkship, swearing, admission, &c. It is difficult to see what reasonable construction an act passed merely for the increase of the enue is to relate back to other acts passed several years previously, for other purpose than to secure to the public that persons practising as attor- s should be possessed of competent knowledge and ability. *Hodgson* and *ss* (*b*), came before the Court in a different shape from this case, and upon a erent statute; but the principle there laid down is precisely the same as t now contended for by the defendant; that having once duly obtained mission as an attorney, his admission is not to be nullified by a mere enue act, so as to subject him to the penalties imposed for practising with- any admission at all. What is the consequence of neglecting to renew a tificate? No fresh clerkship, or examination, or swearing, is necessary, t these were the material ingredients of a qualification when the acts of orge II. were passed. Simple readmission is all that is required. It may observed, too, that s. 30 of 37 G. 3 imposes a penalty of 50*l.* on attornies ctising without certificate; so that the adequate punishment for their lect is not left to the supposed operation of the words "null and void" in 31st section. [COLERIDGE, J.—Is this penalty imposed for acting in the nty Courts?] It is not; and for this very good reason, that no certificate ll is necessary to enable an attorney to act in the County Courts. The ument on the other side is this; the penalty for practising in County rts without the qualification of 12 G. 2 is to be extended to the want of alification created by another subsequent act, which has no relation to nty Courts whatever.

Lord DENMAN, C. J.—The case of *Hodgson* and *Ross* (*b*) was a very much nger case than this. The rule must be made absolute for a nonsuit.

WILLIAMS, J.—Attornies practising in County Courts require no certificate ll. It would, therefore, be a most enormous proposition to lay down, that neglect to renew a certificate is to have the effect of vacating their admis- n, in a case where no certificate at all is necessary.

COLERIDGE, J.—I am quite of the same opinion, and for the same reason.

Rule absolute, for entering a nonsuit.

(*a*) 1 B. & C. 254. (*b*) 3 Ad. & El. 224. 1 Har. & Woll. 265, S. C.

King's Bench.
Jan. 18th.

DOE, d. GRATREX and another, *v.* HOMFRAY.

A devise of lands to the use and intent that R. D. & W. L. shall and may receive the rents, &c. and pay the same to J. J. vests the legal estate in the former.

THIS action was tried before *Patteson*, J., at Brecon, when a verdict was found for the plaintiff, with leave for the defendant to move to enter a nonsuit, if the Court should be of opinion that the trustees, in whose room the present plaintiffs had been appointed under the direction of the Court of Chancery, took no legal estate, under the following will of *John Jones*:—"I give and devise all those my farms, &c., situate, &c., unto my son *James Jones*, to hold to my said son, his heirs and assigns for ever, *and also all other my freehold estates situate &c. to the use and intent that the Rev. Richard Davies and Walter Lewis, their executors or administrators, or the executors or administrators of the survivor of them, shall and may receive and take the rents, issues, and profits of the above-mentioned estates, and pay the same to my son James Jones for and during the term of his natural life, and from and immediately after his decease, then I give and devise the same and every part thereof to the heirs of the body of my said son James Jones lawfully to be begotten;* and in default of such issue, then I give and devise the same and every part thereof to my daughter *Catherine Jones*, and the heirs of her body lawfully to be begotten; and in default of such heirs, then I give and devise the same and every part thereof unto my son *John Jones*, his heirs and assigns for ever."

Chilton shewed cause. The trustees took the legal estate. They are to receive the rents and pay them over, which they cannot do unless the use be executed in them. It may be laid down generally, as a doctrine never impeached, that wherever something is to be done by the trustees, which makes it necessary for them to take the legal estate, the legal estate is vested in them. In *Doe*, d. *Leicester*, v. *Biggs* (*a*), where the devise was to trustees and their heirs, in trust to pay unto, or permit and suffer the testator's niece to have, receive, and take the rents and profits for her life, it was held that the use was executed in the niece. But Lord *Mansfield's* only reason for that decision was, that the words "to permit, &c. came last, and that in a will the last words should prevail. He cited also *Garth* v. *Baldwin* (*b*), *Robinson* v. *Grey* (*c*), and *Jefferson* v. *Morton* (*d*). The will is inartificially drawn, but the testator has expressed himself plainly with respect to the estates, with which he did not intend the trustees to intermeddle. He has given them directly to his son.

John Evans in support of the rule. In all the cases cited on the other side there was a direct devise to the trustees; here the devise is not to them, but "to the use and intent," &c. The trustees have nothing to do but simply to receive and pay over the rents. No discretion is vested in them. Again, after the termination of the life estate of the son the property is at once devised to the unborn heirs of his body, without any interposed estate to the trustees to preserve contingent remainders.

(*a*) 2 Taunt. 109.
(*b*) 2 Ves. 646.
(*c*) 9 East, 1.
(*d*) 2 Saund. 11 A.

Lord DENMAN, C. J.—We will consult with my brother *Patteson*, who tried the cause, before giving our decision.

On a subsequent day in the Term judgment was given by

Lord DENMAN, C. J.—On the argument of this case before my brother *Williams* and myself, we thought it fell within a numerous class of cases of devises to trustees to pay over rents, which duty vests the estate in such trustees. The only reason given for distinguishing it was, that here the devise is not directly to the trustees, but "to the use and intent" that they may receive and pay over the rents. Neither this circumstance, nor the absence of any devise to trustees to preserve contingent remainders, appears to us to make any difference. It was observed, that nothing is required to be done by them except to pay. But this alone has been held sufficient to carry the legal estate, and must be taken to be settled law. My brother *Patteson* was of this opinion at the trial, which opinion he still retains. The rule for a nonsuit must be discharged.

Rule discharged (*e*).

(*e*) *Littledale*, J. and *Coleridge*, J. were both absent from illness.

The KING *v.* The Inhabitants of WITHERNWICK.

Jan. 23.

At the hearing of an appeal against an order of removal no objection to the order can be taken, unless stated in the notice of the grounds of appeal conformably to 4 & 5 *W.* 4, c. 76, s. 81, even though such objection appear on the face of the order. *Per Coleridge*, J. —An order for the removal of a pauper and his children, omitting the names and ages of the children, is not on the face of it bad.

UPON appeal against an order of justices, made 13th February, 1835, for the removal of *William Toplady*, *Ann* his wife, *and their four children*, from the township of *Withernwick* to the township of *West Newton*, both in the East Riding of the county of *York*, the sessions confirmed the order as to the pauper and his wife, but quashed it as to the four children, subject to the opinion of this Court, as to whether the appellants were entitled, at the trial, to take objection to the order on account of its omitting the names and ages of the children, such objection not having been set out in their notice of the grounds of their appeal. The case sent up contained other points, but they were not referred to by the Court.

R. C. Hildyard, in support of the order of sessions.—Notwithstanding the new Poor Law Act, it is still open to the appellants to object, at the trial, to any defect appearing on the face of the order of removal. Here there is such a defect as makes the order a mere nullity. If an order be made for removing a man, his wife and children, it is necessary to state the names of the children. Perhaps if the ages only had been omitted the order would not be bad on that account; or if the ages only had been stated, provided it appeared the children were under the age of seven years (*a*). An order is in fact a judgment, and must be certain. There must be such description of the parties affected by it as will enable them to be identified. Here it is bad, as being too general, in stating neither the names nor ages of the children. This Court will not call on the Court of Quarter Sessions to lose their

(*a*) 2 Nolan, 223.

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time in coming to a decision which would be a mere nullity. Any Court may take notice of such defects as would render their decision a nullity. The justices, therefore, properly quashed this order upon such a defect appearing on the face of it. [Coleridge, J.—Observe the great injustice that may be effected by allowing an objection to be taken, of which no notice has been given. Had the respondents been apprised of this objection they might have abandoned the order; as they were not, they go to sessions.] The only object of giving notice is, that the other party may not come to prove matters not contested, and to apprise him of what will be contested. The enactment was made for the purpose of avoiding the expense of bringing up unnecessary witnesses. Here none of that mischief is created; both parties must be supposed to have full knowledge of what appears upon the face of the order, and such objection does not require evidence to combat it. The case of *Rex* v. *Bromyard* (*b*) will be cited by the other side; but that decision does not apply here. There is a difference between the provisions regulating the proceedings in an appeal against a rate, in 41 G. 3, c. 23, and those in the Poor Law Amendment Act. The former enacts, that the notice of appeal shall state the *causes* or *grounds* of appeal, the latter the *grounds* only, a much more limited form of expression. Besides, in that case the rate was voidable only, not actually void; here the order is a mere nullity. And the record being now before this Court, it must notice to the defect.

N. R. Clarke and *Archbold*, *contrà*.—The whole ground of the objection on the other side is, that the order is a nullity. But that is not so. Mr. *Nolan* only states, that it is perhaps necessary to set out the names of the children, if they are known. Suppose that they were not known, *Rex* v. *Bromyard* (*b*) is precisely in point. [They were then stopped by the Court.]

Lord Denman, C. J.—We do not entertain any doubt upon this point. The provisions of the 81st section of the Poor Law Amendment are, that in every case where notice of appeal is given a statement in writing of the grounds of such appeal shall be sent; and that it shall not be lawful, on the hearing of any appeal, to go into or give evidence of any other grounds than those set forth in such statement. And we think that we ought not to introduce any distinctions in the application of these clear and comprehensive words. It becomes, therefore, unnecessary for us to consider whether the defect is formal or substantial, amendable or otherwise. We are all of opinion that the sessions were not warranted in entertaining the objection.

Williams, J.—I do not find that there has been any decision confining the application of this clause to matter brought forward upon evidence only. Assuming, therefore, that we are left unfettered, and thinking, as I do, that this act ought to receive an ample construction, I am clearly of opinion that the appellants were prohibited from entering upon an objection not included in their notice. Our decision upon this point precludes the necessity of considering the others.

Coleridge, J.—I am of the same opinion. It has been a frequent com-

(*b*) 8 B. & C. 240.

plaint that the refinements allowed by this Court in the construction of statutes relating to the poor has been the cause of much litigation. We are now dealing with a new act of parliament, the words of which are most distinct, and I think we are bound to give them their plain and literal interpretation. It has been said, that they do not apply to defects on the face of the order. I do not see why. It is said, that the party in possession of the order is bound to know those defects, and the law relating to them. So he may; but he may be led to suppose that the other party does not intend to rely upon them, and for that very reason attempt to support his order. Lastly, it was said, that when an order is brought here the Court is bound to quash it for a defect apparent on the face of it. Conceding that position, I am not prepared to say that an order of removal is necessarily bad on the face of it, because neither the names nor ages of the children are stated. Neither of them may have been known. The children may never have been christened, nor have obtained a name by reputation. To shew, therefore, that a defect does exist in such case, some evidence must be employed. Here we are at liberty to make any reasonable surmise in support of the order; because, unless it is necessarily bad on the face of it, unless no state of things can be supposed under which it can be supported, the whole argument fails. The order of sessions must therefore be confirmed as to the pauper and his wife, and quashed as to the children.

Order of sessions quashed as to the children.

The KING *v.* The Inhabitants of RITTENDEN.

Jan. 25.

No contract of hiring & service, the service under which was not completely performed at the time (14th *Aug.* 1834) of the passing of 4 & 5 W. 4, c. 76, s. 65, confers a settlement; although the service already performed partly under the contract, and partly not, together exceed a year's service.

UPON appeal against an order of justices, dated 20th March, 1835, whereby *Sophia Attridge* and child were removed from the parish of *Rittenden*, in the county of *Essex*, to the parish of *Ingatestone*, in the same county, the sessions quashed the order, subject to the opinion of the Court on the following case:—

On the 28th June, 1833, the pauper *S. A.* went into the service of one *Elizabeth Baker*, as her servant for the month, at wages of 1*s.* a week. The pauper continued in the service of *E. Baker* for a month, and was then hired to be her servant till the following *Michaelmas*, at the like wages of 1*s.* a week, and continued to serve up to the said *Michaelmas*. The pauper was then hired by *E. Baker* to be her servant for the following year at 50*s.* a year, and continued to serve her during the whole of such year. From the time of the first hiring in *June*, 1833, till *Michaelmas*, 1834, there was an unbroken continuance of service, and the pauper always resided in the house of her mistress, in the parish of *Rittenden*. The question for the consideration of the Court was, whether, reference being had to the 4 & 5 Will. 4, c. 76, s. 65, the pauper, under the circumstances, gained a settlement in *Rittenden*. If so, the order of sessions to be confirmed; otherwise, to be quashed.

Knox and ***Turner***, in support of the order of sessions. The question arises under the new Poor Law Act, the 65th section of which enacts, that "*no person under any contract of hiring and service not completed at the time of the passing of this act shall acquire, or be deemed or adjudged to have*

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acquired any settlement by reason of such hiring and service, or of any residence under the same.

Under the old law there is no doubt but that service, under a yearly hiring, might be coupled with service under a hiring for a shorter period, for the purpose of gaining a settlement. Here, before the 14th of *August*, 1834, when the new Poor Law Bill received the royal assent, the pauper had served a complete year, partly under the yearly hiring and partly under a previous hiring. The pauper, therefore, had, before the passing of that act, gained a settlement at *Rittenden*. Such a settlement is not taken away by any express words. The 68th section interferes to defeat one kind of settlement; namely, by estate, although already acquired; but the language of that clause is clear, "that no person shall be deemed, adjudged or taken to *retain* any settlement gained, &c." The clause under consideration uses no such words. *Rex* v. *Marylebone* (*a*) may be cited on the other side. It was there held, that a pauper did not gain a settlement by having resided, on a tenement of adequate value, more than 40 days altogether, but less than 40 days before the passing of the 59 Geo. 3, c. 50, by which a residence for twelve months is required for the purposes of settlement. But, in that case, the pauper had resided only 38, and not 40 days, when the act passed. The settlement was, therefore, only in progress, and had not already been acquired. [COLERIDGE, J.—Do you give any meaning to the words "be deemed or adjudged to *have acquired?*"] They cannot mean that a settlement already completed is to be divested. If this appeal had been tried at the *Midsummer* sessions 1834, instead of the *Midsummer* sessions 1835, the settlement would of course have been held good. The time of trying the appeal cannot make any difference.

Ryland and *Calvert*, *contrà*, were stopped.

Lord DENMAN, C. J.—The words of the act leave no doubt on this question. At the time of the passing of the New Poor Law Act the service under this contract was not completed. The contract, therefore, of hiring and service was not completed, and no settlement has been gained under it. It is immaterial to the public and to the pauper where he is settled; but it is most desirable that no erroneous notions on this act should be entertained, and that it should come into operation as soon as possible.

WILLIAMS, J.—It is clear that this contract was not completed when the act passed. By the old law, a service under the hiring might have been coupled with one not under the hiring, to make up the year's service. But this act requires that the entire contract should have been completed; that is, that the service stipulated for under the particular contract should have been completed at the time of the passing of the act.

COLERIDGE, J.—Before this act of parliament passed a settlement might have been acquired, under the circumstances of this case, without ever completing the contract of hiring and service. But this act, treating the contract of hiring and service as an entirety, says, that we are not to adjudge any

(*a*) 4 B. and A. 681.

person to have acquired a settlement, unless the contract of hiring and service were completed at the time the act passed. Has that been done? The service agreed for under the contract was not completed. The contract itself, then, had not been completely performed. I do not see how it is possible to get over the words of the statute.

Order of sessions quashed.

The KING *v.* The Inhabitants of WALTHAMSTOW.

January 25.
A pauper since the passing of the New Poor Law, 4 & 5 W. 4, c. 76, married a woman with three unemancipated children by a former husband, who was not settled in either of the contending parishes. By section 57 of the above act the second husband is liable to maintain such children as part of his family, until the age of 16, or the death of their mother; and they are, for the purposes of the act, to be deemed a part of such husband's family accordingly.

Held, that they were not removable to the place of the second husband's settlement under an order adjudging them to be there settled.

Quære.—Would they have been removable under an order containing no adjudication of settlement, but adapted to the special circumstances?

THIS was an appeal against an order of justices for the removal of a pauper, the material parts of which were in the following terms:—

Whereas complaint hath been made unto us, &c. by the overseers of the poor of the said parish of *Walthamstow*, That *William Hammond*, *Eliza* his wife, and their lawful child, named *Mary Ann*, aged three months, or thereabouts; *and also three other children*, namely, *Sarah*, aged seven years, or thereabouts; *Thomas*, aged six years, or thereabouts; and *James*, aged four years, or thereabouts; *which the said Eliza Hammond had by her former husband*, have come to inhabit in the said parish of *Walthamstow*, not having gained a legal settlement there, nor having produced any certificate acknowledging them to be settled elsewhere, and now have actually become chargeable to the said parish; We, the said justices, upon examination of the premises upon oath, and other circumstances, do adjudge the same to be true, *and do also adjudge the place of the legal settlement of the said William Hammond, Eliza his wife, and the children aforesaid, to be in the said parish of Saint Leonard, Shoreditch, in the said county of Middlesex.*

The order then concluded in the usual way by requiring the overseers of *Walthamstow* to remove *William Hammond*, *Eliza* his wife, and the aforesaid children, to *St. Leonard, Shoreditch*. The sessions confirmed the order as to the pauper, his wife and child, but quashed it as to the three other children, subject to the opinion of this Court upon the following case:—

The pauper *William Hammond* was married to *Eliza* his wife on the 28th *September*, 1834, and his settlement at that time, and up to the time of the order of removal, was in the parish of *St. Leonard, Shoreditch*. At the time of the marriage of the pauper and his wife she had, by a former husband, who was not settled in either of the said parishes, the three children named in the order, of the ages therein stated, all of whom were unemancipated. The question for the consideration of the Court was, whether, reference being had to the 4 & 5 Will. 4, c. 76, s. 57, the said three children of the said *Eliza Hammond* by her former husband were removable under this order to the parish of *St. Leonard, Shoreditch*.

If the Court should decide that the said three children were so removable, the order of sessions, so far as it related to the said three children, to be quashed; otherwise, to be confirmed.

Cripps, in support of the order of sessions. The question turns upon the meaning of the 57th section of the Poor Law Amendment Act, "That every man who, from and after the passing of this Act, shall marry a woman having a child or children at the time of such marriage, whether such child or

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children be legitimate or illegitimate, shall be liable to maintain such child or children as a part of his family, and shall be chargeable with all relief, or the cost price thereof, granted to or on account of such child or children, until such child or children shall respectively attain the age of sixteen, or until the death of the mother of such child or children; and *such child or children shall, for the purposes of this act, be deemed a part of such husband's family accordingly.*" The other side must, upon the terms in which this case is stated, contend that the effect of this clause is to make the three children part of the second husband's family for every purpose, and to change the settlement which they have already acquired by birth into some other head of settlement which has not yet acquired a name.

It is immaterial to consider whether they might be removed with the mother, until they should be respectively 16 years old, under an order framed expressly to suit this section, because the sessions have here adjudicated upon their settlement. The construction to be contended for of the words "shall, for the purposes of this act, be deemed, &c." is unnecessary. One of the purposes of the act was to compel the second husband to support children under circumstances like the present, and to make him punishable under the vagrant act in case of default. The sections altering the old law of settlement are inclusively from the 64th to the 71st, which are most explicit; and the last shows that when the Legislature meant that a new kind of settlement should be acquired, they knew in what words to express it.—[He was then stopped.]

Ryland and *C. R. Turner, contrà.* The question is not, whether the children are settled in *St. Leonard's*, but, whether they are removable to that parish. The form of the order was not made a point at the sessions. [Lord DENMAN, C. J.—What power have the justices to remove them at all, except to the place of their settlement? Suppose the sessions had confirmed the order absolutely, how could the parish of *St. Leonard's* have ever got rid of them?]—The object is of a limited nature. Until the age of sixteen they are not separable from their mother, nor she from her husband. They must therefore all go together. What is to be done with them at the age specified, or on the death of the mother, is not said; but perhaps they would be remitted to any former place of settlement. Any inconvenience from the supposed adjudication of settlement, if the order of removal had been confirmed at sessions, might have been obviated by a special entry.

Lord DENMAN, C. J.—The justices had no power to remove the children of the prior marriage to the appellant's parish, unless they were there settled. The act does not in terms give any new settlement to such children; nor can we infer one from the inconvenience which would attend their separation from the mother. Perhaps, in point of fact, no such separation will be made; but the justices had no right to remove them to the appellant parish, at all events, under this order, which might affect the rights of the parish thereafter.

WILLIAMS, J.—In the 71st section there is an express provision on the subject of settlement. That was used by Mr. *Cripps* as being very much *in pari materiâ*, and containing a provision with respect to settlement, where settlement was in contemplation: whereas the 57th section has no such pro-

vision. The difficulty suggested in the course of the argument seems to me to be very strong indeed. The order of removal here adjudicates on the last legal settlement of these children. What is to become of this order hereafter? Is it not a conclusive finding? If so, it is sought to sustain it by the construction of the 57th section, which, whatever may have been its intention, contains no provision at all about settlement.

COLERIDGE, J.—We are called on here to say that the children, under the age of sixteen, whether legitimate or illegitimate, of a woman marrying subsequently to their birth, lose any settlement they may have had, acquire the settlement of the new father, and become removable under this act to that other settlement until the age of sixteen, or the death of the mother. Now the words of the 57th section do not import this necessarily. Not being forced, therefore, to go beyond the literal interpretation of this clause, I am at liberty to look to the consequences of any other interpretation, and to the purposes which the Legislature appears to have had in view. I can see that very great novelty and inconvenience would be introduced into the law of settlement by holding that the settlement of the children in this case became changed by the marriage of the mother; whereas the contrary conclusion does not seem inconsistent with one of the purposes of the act; which was not so much that the children should be kept together with the mother, as that the husband should be liable to maintain them as part of his family until the age of sixteen, or the death of the mother. An argument for this construction is supplied by the 71st section, where the Legislature, dealing with a similar subject matter, but intending to alter the law of settlement, expresses itself as might be expected, and says, that an illegitimate child shall have the settlement of the mother until the age of sixteen. The 57th section has no such words.

Order of Sessions confirmed.

The KING *v.* The Inhabitants of STOKE DAMAREL.

January 26.
Settlement by paying rates in respect of a tenement subsists notwithstanding 6 G. 4, c. 57, and 1 W. 4, c. 18; and the actual occupation, required by the latter act, does not apply to it. Where, therefore, the pauper occupied, &c. and paid rent for a tenement conformably to the former act,—*Held* that a settlement was gained by payment of rates, although he had underlet part and could not therefore gain a settlement by renting a tenement.

ON appeal against an order of justices, for the removal of *Thomas Pearce* and *Elizabeth* his wife, from the parish of *Stoke Damarel*, in the county of *Devon*, to the parish of *Plympton Maurice*, in the same county, the sessions quashed the order, subject to the opinion of this Court upon the following case:—

The pauper *Thomas Pearce* had gained a settlement in *Plympton Maurice*. Subsequently to having gained such settlement, and also subsequently to the passing of 1 Will. 4, c. 18, he rented a house in *Stoke Damarel* at 16*l.* a year; paid his year's rent; was rated for the house to the parochial rates, and had paid such rates, but during the whole of such tenancy had underlet a portion of the house of the value of 4*l.* a year. It was contended by the appellants, that though the pauper was prevented by 1 Will. 4, c. 18, from gaining a settlement in *Stoke Damarel* by renting, he having underlet, and therefore not occupied the house, as required by that statute; yet still that he had gained a settlement there by payment of parochial rates.

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The question for the opinion of the Court was, whether the pauper had gained such settlement.

J. Greenwood, in support of the order of sessions. The question is, whether the head of settlement by payment of parochial taxes still exists. Settlement by contribution to the rates of a parish was expressly given by 3 Will. 3, c. 11, s. 6, which enacts, that if any person, who shall come to inhabit in any town or parish, shall be charged, and pay his share towards the public taxes or levies of the said town or parish, then he shall be adjudged and deemed to have a legal settlement. Before the 35 Geo. 3, c. 101, it was immaterial on what account the tax was paid. But section 4 of that statute provided that no person should gain a settlement by paying his share towards the public taxes of the parish, in respect of any tenement not being of the yearly value of 10*l.* This act for a time swamped settlements of this description; for as a settlement at that time was gained by the occupation of a tenement of the annual value of 10*l.*, without more, no one would unnecessarily go on to prove that he had also paid rates in respect of the same tenement for the purpose of gaining a settlement by payment of rates. The act, however, did not abrogate the settlement in question. *Rex* v. *Islington* (*a*), and *Rex* v. *Penryn* (*b*), in which it was said to have been abrogated, were overruled by *Rex* v. *St. Pancras* (*c*); which last decision has been recently confirmed by another and recent case of *Rex* v. *Penryn* (*d*). Accordingly, after the 59 Geo. 3, c. 50, imposed upon the acquisition of a settlement by renting a tenement, some additional limitations, such as a year's tenancy and payment of a year's rent, from which the head of settlement, now under consideration, is exempt, it again emerged into use. Then came the 6 Geo. 4, c. 57, which again made it almost nugatory, by re-incumbering it with conditions, the performance of which would of itself give a settlement by renting a tenement; *Rex* v. *Great Wakering* (*e*). Here the occupation is admitted to satisfy the requirements of the last-mentioned statute for the purposes of either settlement. And the only question seems to be, whether payment of rates still subsists as a mode of acquiring a settlement; and, if subsisting, whether it is affected by 1 Will. 4, c. 18. That act, after reciting the whole of 6 Geo. 4, superadds to the terms required for a settlement by renting a tenement under 6 Geo. 4, that there must be an actual occupation of such tenement; *Rex* v. *St. Nicholas, Rochester* (*f*), and *Rex* v. *St. Nicholas, Colchester* (*g*). But although it incorporates *in its recital* the whole of 6 Geo. 4, which restricts settlement by payment of rates, as well as settlement by renting a tenement; yet it does not, *in its enacting part*, which restricts still further the settlement by renting a tenement, say anything whatever of settlement by payment of rates. The 1 Will. 4, therefore, being in its operative part altogether silent on the subject, does not apply; and the occupation being sufficient according to *Rex* v. *Ditcheat* (*h*), a settlement is made out under 6 Geo. 4.

Crowder, contrà. 1 Will. 4 incorporates the whole of 6 Geo. 4, and was

(*a*) 1 East, 283.
(*b*) 5 M. & S. 443.
(*c*) 2 B. & C. 122.
(*d*) 4 B. & Ad 224.
(*e*) 5 B. & Ad 971.
(*f*) 5 B. & Ad 219.
(*g*) 2 A. & E. 599.
(*h*) 9 B. & C. 176.

assed, as its recital shows, for no other purpose than to clear up doubts that had arisen, with respect to the occupation contemplated by the latter statute with reference to both kinds of settlement. It then enacts, that the same person who hires shall *actually* occupy the tenement, in order to acquire a settlement. If the Court see the intention of the Legislature, they will give effect to it. This s an attempt to revive a kind of settlement which the Legislature thought it had extinguished. [COLERIDGE, J.—It is conceded there is enough in this case to satisfy 6 Geo. 4.] It is so. [COLERIDGE, J.—The 3 Will. 3 gives this sort of settlement. Afterwards the 6 Geo. 4 says, certain additional requisites are to be complied with. Does that repeal this mode of settlement? It may have been purposely retained, as being easy of proof.] It is admitted there is no direct repeal; but it is the same thing in effect, if settlement by payment of rates has been made subject to the same restrictions with settlement by renting a tenement, and has thus been rendered nugatory.

Lord DENMAN, C. J.—I believe that the intention of the Legislature in passing 1 Will. 4 may have been to get rid of settlement by payment of rates; and Lord *Ellenborough* was of opinion (*i*), that 35 Geo. 3 was passed with the same intention. That intention, however, was not then carried into effect; and the settlement, contrary to expectation, revived again some years afterwards. At the time of the passing of 6 Geo. 4 it cannot be disputed but that a settlement might be gained by payment of rates and occupation. Here it is admitted that the occupation of the tenement has been sufficient according to the last-mentioned act; and the only question is, therefore, whether 1 Will. 4 applies to this head of settlement, so as to render necessary to it that there should be an actual occupation of the whole tenement. It certainly recites the whole of 6 Geo. 4, which says that a person shall not gain a settlement, either by renting a tenement or by payment of rates, except upon certain terms; and it then proceeds to add, that a settlement shall not be gained by renting a tenement unless actually occupied. But the statute, in its enacting part, omitting all mention of settlement by payment of rates, how can we say that the Legislature, whatever its intention may have been, has taken effectual means for abrogating this head of settlement? There may be, as my brother *Coleridge* suggested, a reason why the Legislature purposely retained it; at all events, I think that it still subsists, notwithstanding 1 Will. 4.

WILLIAMS, J.—I am of the same opinion. Mr. *Crowder* has properly admitted that there is no repeal of settlement by rating nominatim. But he has not admitted quite enough; for in 6 Geo. 4 this is expressly treated as an existing head of settlement. If 1 Will. 4 had not passed, enough is stated in this case to show that the pauper had, consistently with the previous acts, acquired a settlement either way, whether by renting the tenement or by payment of rates in respect of it. Then it is said, 6 Geo. 4, having for its object to exclude underletting from the one kind of settlement as well as the other, but having been so interpreted as to defeat this object, that 1 Will. 4 was passed to correct the decisions which this Court had come to. That may have been the intention of the latter statute; but after embracing in its recital

(*i*) *Rex* v. *Penryn*, 5 M. & S. 443.

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both sorts of settlement, it makes provisions with respect to one of them only, and leaves the other quite untouched.

COLERIDGE, J.—I am of opinion that the order of sessions is right in this case, which appears to me a very clear one. Settlement by payment of rates was given affirmatively by 3 Will. 3. Pass over the intermediate statutes. It was restrained by 6 Geo. 4; with the regulations of which it then became necessary to comply, in order to acquire this kind of settlement. Mr. *Crowder* says, that that statute must of itself be taken to annul this head of settlement. That is precisely the same argument that was used unsuccessfully in *Rex* v. *Penryn* (*j*). With respect to 35 Geo. 3, Mr. *Crowder* says, the language of that statute was different from the language of 6 Geo. 4. That may be, but it was quite as strong.

Order of Sessions affirmed.

(*j*) 4 B. & A. 224.

The KING *v.* the Inhabitants of CLOTSWORTH.

Jan. 25th.
An indenture of apprenticeship executed in a foreign country by a person of full age:—Held, to confer a settlement by residence under it in this country, without proof of the law relating to apprenticeship in that foreign country.

UPON appeal against an order of justices for the removal of *R. Bartlett*, his wife and children, from the parish of *Clotsworth* to the parish of *Pendover*, in the county of *Somerset*, the sessions discharged the order, subject to the opinion of this Court on a case which stated a variety of facts; but the only question argued and decided by the Court arose upon the following circumstances:—

In 1817, the pauper, an Englishman, and then of age, bound himself by indenture of apprenticeship, to Mr. *John Colburne*, as a sailor, for three years. Mr. *Colburne* was partner in a house carrying on business, and having establishments both in *England* and in *Newfoundland*. The indenture was executed by the pauper and by his master in *Newfoundland*. The home of Mr. *C.'s* vessel, on board of which the pauper served, was *Poole*, in *Dorsetshire*, and he inhabited and served under the instrument for more than forty days, in the parish of *St. James's* in *Poole*. No evidence was given of the law of *Newfoundland* relating to apprenticeship. The question for the opinion of the Court was, whether the pauper gained a settlement by apprenticeship.

Sir *W. W. Follett*, in support of the order of sessions, was stopped by the Court.

Kinglake, *contrà*.—The instrument in question was a contract executed abroad, and therefore, though the parties to it are *British* subjects, it ought to have been proved to be executed according to the laws of the foreign country. The Courts require, in such cases, strict evidence to shew that the laws prevailing where the contract was executed have been observed; *Bank of St. Charles* v. *Bernales* (*a*). It is very possible that some ingredients, other than

(*a*) 1 R. & M. 190.

those required in *England*, are necessary to constitute a valid indenture in *Newfoundland*. Next, even if it were proved to be a valid indenture of apprenticeship in *Newfoundland*, no settlement under it can be gained in this country. All the laws that have been made relative to the gaining of settlement by apprenticeship relate to indentures executed in this country solely, and to persons wholly dwelling and domiciliated here. The statute 5 Eliz. c. 4, which defines who may take and who shall be bound apprentices, contains a number of regulations which can only apply to apprentices residing, and to indentures executed, in England. It is true that this statute has been repealed, but the statutes 13 & 14 Chas. 2, c. 12, and 3 & 4 W. & M. c. 11, s. 8, and all others, whenever they use the term apprentice, refer to such a party only as has been before defined by the statute of *Elizabeth*. [COLERIDGE, J.—That statute provided that an apprentice must be taken for a certain time, and be bound to a housekeeper; but still it has been held that if taken for a less time, or bound to a lodger, a settlement may be gained.] All that the Courts have said is, that such indentures are voidable at the option of the party. It is obvious that all the conditions and regulations of all the existing statutes might at any time be evaded, if a contract made in a foreign country is held to be a good indenture of apprenticeship.

Lord DENMAN, C. J.—It appears to me that a settlement has been gained under this indenture. The objection to it is founded on 13 & 14 C. 2, c. 12, s. 1, under which statute an apprentice, in order to gain a settlement, must, it is contended, have complied with all the requisitions of the act of *Elizabeth*. It is not necessary to inquire into the nature and extent of those requisitions, because so much of the statute as relates to them is repealed by 54 Geo. 3, c. 96, s. 1. No special objection, therefore, to this indenture can be founded on 5 Eliz. c. 4. There is a subsequent statute, 5 Eliz. c. 5, s. 12, which makes several provisions as to the binding and enrolment of the indentures of apprentices in the sea service; and among others, that the bond of apprenticeship be enrolled in the town where the apprentice resides, if it be a corporate town; and if not, that it be enrolled in the corporate town nearest to the habitation of such apprentice. But it was notwithstanding held in *Rex* v. *Gainsborough* (*b*), that the non-compliance with these provisions does not vitiate the indentures, so as to prevent a party from gaining a settlement. I do not think it was necessary to shew that this was a valid contract by the law of *Newfoundland*. A contract to teach and learn is *primâ facie* lawful, and for the advantage of trade in all parts of the world. The apprentice was of age at the time he executed the instrument, otherwise it might have been proper to shew that by the law of the foreign country an infant had power to bind himself. I do not see any other difficulty in the case. I am of opinion that a settlement has been gained by apprenticeship.

WILLIAMS, J.—I am of the same opinion. I think this is a binding contract in this country, the party being of age at the time he entered into it. It is clear, on the face of the instrument, that the relation of master and apprentice was constituted by it, and nothing else. It has been said that by

(*b*) Bur. S. C. 586.

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the law of *Newfoundland* some other requisites may exist. There is no proof that they do, and I cannot see why we should be called upon to imply them. Allusion has been made to the statute of *Elizabeth*, the language of which is extremely strong, that an indenture made otherwise than as directed by that act shall be null and void to all intents and purposes. Yet it has been held, that where there was a binding for a less period of time than is therein required, a settlement might be gained. I therefore think that a residence of forty days under this instrument conferred a settlement.

COLERIDGE, J.—I am of the same opinion. It has been said that no apprenticeship has been made out in this case, and that for two reasons. First, because there has been no evidence given of the law of *Newfoundland* on the subject of apprenticeship. But here is a written contract which we have a right to inspect for the purpose of ascertaining its objects. And it appears from its language that nothing was contemplated except teaching on the one hand, and learning on the other. It must be taken, then, until the contrary be shown, to be a valid contract of apprenticeship. Secondly, it is said, that this contract having been entered into in a foreign country, cannot be brought within our settlement law. The argument is, that the statutes of *Charles* and of *William* and *Mary* are to be considered with reference to the statute of *Elizabeth*, as the foundation of the law relating to apprentices, and that this statute, in speaking of husbandmen and tradesmen in corporate towns, and enrolment in the nearest market town, and other matters, can only apply to contracts made in this country. But that argument can only be maintained, on the supposition that no contract of apprenticeship can be good unless made in strict compliance with the provisions of the statute in question. Now, although that statute uses the strong terms "void in law to all intents and purposes," there has been decision after decision, that a settlement may be acquired where there has been *de facto* a binding and service, notwithstanding that several of the provisions of the statute have been broken through. By the statute, no one but a householder can take an apprentice, yet it has been determined that a mere lodger is competent to do so. The argument, therefore, that the laws relating to apprenticeship can only apply to contracts made in this country cannot be sustained.

Order of Sessions confirmed.

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Jan. 25th.
To gain a settlement under 1 W. 4, c. 18. The whole of the tenement taken must be actually occupied by the party taking it, although it consist of more dwelling-houses than one, and the single house occupied be worth more than 10*l.* of the whole rent.

UPON appeal against an order of justices made the 7th *February*, 1835, for the removal of *John Wilday*, with his wife and children, from the parish of *Berkswell* to the hamlet of *Balsall*, both in the county of *Warwick*, the Sessions quashed the order, subject to the opinion of this Court, upon the following case:—

Previous to Lady-day, 1832, the pauper hired two cottages, being separate and distinct dwelling-houses, but adjoining to each other, and under one continuous roof, together with three acres of land situate in the respondent parish,

ar, from Lady-day, 1832, at the yearly rent of 14*l.* At Lady-day, e pauper entered into possession of one of the cottages and the land, pied the same under the said hiring till Lady-day, 1833. The other e laid out money upon, and converted into a beer shop, and underlet *Stoney*, at a yearly rent of 4*l.*; and *Stoney* occupied the same till ly-day, 1833, and paid the pauper the rent for it. The year's rent of rved by the agreement for the whole property, was paid by the pauper ndlord. The cottage and land occupied by the pauper were worth n 10*l.* of the rent of 14*l.* paid by him for the whole premises. If the *King's Bench* should be of opinion, upon this state of facts, that the ained a legal settlement in *Berkswell*, the order of Sessions to be d; but if not, the order to be quashed.

ington and *Hayes*, in support of the order of Sessions. The pauper settlement in *Berkswell*, under 1 W. 4, c. 18, by occupying the and land. The only alteration effected by that statute consists in that the "house, or building, or land," shall be actually occupied by hiring the same. That is, if the tenement consist of a single house, e wholly occupied by the party hiring it. A dwelling-house is not under this statute. But it does not require the occupation of more hole dwelling-house. The words are not that the whole of the tene-ken" shall be occupied, yet that must be the construction contended e other side. All the requisites of the statute have been complied e pauper occupied a house and land under a yearly hiring, for a year, a rent exceeding 10*l.* Is it then to be said, because he also took house, that his settlement is destroyed, that *utile per inutile vitiatur?* a man to have taken a house with a thousand acres of land, would g off of one acre deprive him of a settlement? In *London*, twenty ften are taken under one agreement; must a man occupy all of them to gain a settlement? Section 2 of the act provides for an appor-of the rent: under 6 Geo. 4, the whole rent must have been s section enacts that payment to the amount of 10*l.*, though only part, sufficient. What distinction is there between apportioning the rent rtioning the tenement to the same amount of value, supposing always e of a distinct dwelling-house to be occupied? The only difference *Rex* v. *Pickering* (*a*) and the present case is, that there part of the en was in another parish, and the case was sent down for the Sessions tain the respective values of the two portions of the land. Suppose parish line to have run between the two houses, then the two cases isely the same. The difference is not substantial, and rather in favor ettlement, because there the unnecessary portion of the land was in parish; here the unnecessary dwelling-house is in the same parish; justices in this case have properly gone into the same inquiry which ces were desired to institute in the other.

and *Daniel*, *contrà*, were stopped by the Court.

Denman, C. J.—This statute 1 *W.* 4, c. 18, was passed in order to

(*a*) 2 B. & Ad. 267.

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avoid the discussion of those questions which formerly so often arose at the sessions relative to the occupation of tenements. We think therefore that it can not receive the construction intended, unless we hold that the subject matter forming the tenement must be entirely occupied by the party taking the same.

WILLIAMS, J.—I am of the same opinion. Every one is familiar with the evils that have resulted in the case of the old statutes, from resorting to what was called an equitable construction of them. We ought, if possible, to avoid those evils when engaged in the application of a recent act of parliament. It seems to me that, according to the plain and obvious meaning of the statute, it is necessary for the whole of the tenement taken to be occupied, in order to confer a settlement, and from that plain and obvious meaning I think we ought not to depart.

COLERIDGE, J.—I am quite of the same opinion. We must decide this case as we do others, by giving the full meaning to the plain words of the statute, not allowing ourselves to speculate on what may be equivalent to those words, or in accordance with the spirit of the act. Looking then to its expressions, we are bound to say that the whole tenement must be occupied by the party taking. We have been pressed with the inconveniences and absurdities that may result from such construction; but I cannot help recollecting that exactly the same arguments were used relatively to the payment of the whole rent. It was said, will you decide that a person renting a tenement of 1000*l.* a year does not gain a settlement, unless every farthing of his rent be paid, when the payment of a rent of 10*l.* would be sufficient? Still the Court chose to construe words according to their plain meaning, and so I think should we in this case. If any inconvenience result from our decision, the proper remedy must be applied by passing another act. It is easier and better for the Legislature at once to interfere, than for us to mould the words of the act in a manner of which we cannot foresee the consequences.

Order of Sessions quashed.

The KING *v.* GEORGE.

Jan. 25th.
The omission of the appellant's name in a poor rate is not *primâ facie* such a grievance as to constitute a ground of appeal against the rate.

ON appeal against a poor rate, made 30th April, 1835, for the parish of *Tid St. Giles*, in the isle of *Ely*, the Sessions confirmed the rate, subject to the opinion of this Court, on the following case:—

The notice of appeal stated "that the said *John George* is not rated and assessed in the rate, for and in respect of a messuage or dwelling-house occupied by him within the said parish; and further, that the said rate is in other respects illegal, unequal, and unjust." At the hearing of the appeal, it was proved that the house had been rated during the occupancy of a former tenant, and up to the time when it ceased to be occupied at 6*l.* a year, but that the last rate was not paid; that it had been unoccupied for a short time; that on account of the difficulty of obtaining payment of the rates, it was not afterwards rated; that the appellant had then become the occupier, had ex-

essed his willingness to be rated, and had requested the parish officers to ate him, but they had not done so; that the parish officers have not of late ated similar houses, on account of the difficulty of obtaining the payment of e rates.

If the Court should be of opinion that the grounds of appeal stated in the otice were sufficient, and that the appellant ought to have been rated in the aid rate, then it was to be amended in that particular, and the order of Sessions quashed; if otherwise, both were to be confirmed.

Crompton, for the appellant.—No excuse is shewn for omitting the name of e appellant in the rate. The omission is in itself a grievance. The appellant by not being rated may lose many privileges, and his franchise among e rest (*a*). [Lord DENMAN, C. J.—If the parish officers can raise enough oney for all exigencies, without descending so low in the rate as to include house of the value of 6*l.*, may they not do so?] [WILLIAMS, J.—You do ot say that the rate is unequal. Generally the complaint is that the appellant has been rated too highly.] The 17 Geo. 2, c. 38, s. 4, gives to persons grieved, generally, the right of appeal. They may be aggrieved without staining pecuniary injury. [COLERIDGE, J.—Must you not contend that e not being rated is *primâ facie* a grievance? From what facts does it ppear that there has been any grievance?] That is the contention; 43 Eliz. 2, s. 1, directs the overseers to rate every occupier of lands. The appellant, y not having been put upon the rate, loses many privileges, the loss of which *primâ facie* a grievance.

Lord DENMAN, C. J.—To rate every occupier is not so much a duty towards he occupier, as a power given to the overseers which they may exercise r not. I think the reason given in this case for not rating the appellant, hat there is great difficulty in obtaining payment from occupiers of small enements, is a very good one. The expense of collecting the rate might xceed its amount.

COLERIDGE, J.—I am of the same opinion. The right of appeal is given n case any person shall find himself aggrieved by any rate made for the relief of the poor, or shall have any material objection to any person being put in or left out of the rate. I cannot see that the simple circumstance of being put in or left out of the rate imports necessarily any grievance; nor do I see any fact stated here to shew that in this particular case any grievance has arisen.

The Court, without hearing *Thesiger* and *Byles contrà*, dismissed the case.

Order of Sessions confirmed.

(*a*) By 2 W. 4, c. 45, s. 30, the Reform Act, and 5 & 6 W. 4, c. 76, s. 11, occupiers who have claimed to be rated are, whether rated or not, to be deemed to have been rated, and to be entitled to vote accordingly.

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Jan. 12th.
Where the service of pauper with a second master was a constructive service to the first, to whom the pauper was under apprenticeship, it is immaterial to the question of settlement that the second master was ignorant of such apprenticeship.

ON appeal against an order of two justices, whereby *Benjamin Roberson*, *Mary* his wife, and their four children, were removed from the parish of *Battle* in the county of *Sussex*, to the parish of *Sandhurst* in the county of *Kent*; the Sessions confirmed the order, subject to the opinion of this Court on the following case:—

The pauper, *Benjamin Roberson*, was born *November* the 10th, 1805, and being settled in *Sandhurst* in the county of *Kent*, was, in the year 1816, put apprentice by his father *Richard Roberson* to his brother *George Roberson*, in *Sandhurst*, to learn the trade of a cordwainer. No indentures were then executed, but by indentures of apprenticeship bearing date the 22nd day of *December*, 1818, to which *Richard Roberson*, father of the pauper, *Benjamin Roberson* the pauper, and *George Roberson* his brother, were parties, the pauper was, with the consent of his father, bound apprentice to *George Roberson*, who resided at *Sandhurst*, to learn his art, and with him after the manner of an apprentice to serve, until the end of seven years to be computed from the 10th of *November*, 1816, when *Benjamin* first entered into the service of *George Roberson*, and from whence he had faithfully served him. By the same indentures *George Roberson* covenanted with *Richard Roberson* the father, that he *George* would teach and instruct, or cause to be taught and instructed, his said apprentice in the art of a cordwainer, and would find him meat, drink, and lodging, during the term of his apprenticeship; and the father *Richard Roberson* covenanted to provide fit and proper clothes and medical aid for him during the same period. When the pauper had been with his master almost five years in all, the master being short of work, it was agreed between the father, master, and pauper, that the latter should endeavour to get work at Mr. *Thorpe's*, at *Battle*, as they had heard that he took apprentices, but it was agreed that the indentures should not be given up. In consequence of this arrangement, the pauper's brother, *Richard Roberson* the younger, who was also a cordwainer, and resided at *Sandhurst*, accompanied the pauper to *Battle*, and applied to Mr. *Thorpe* to know if he could take him into his employ. *Richard* told *Thorpe* that the pauper had worked at the trade of a shoemaker for some considerable time, and that his brother, for whom he had been at work, had not sufficient employment for him, but *he did not tell him that the pauper was an apprentice, and Thorpe did not at any time during his service know that the pauper was an apprentice.* *Thorpe* told *Richard* that his brother might come for a month on trial, and if he suited he would take him for two years. *Thorpe* was to have 5*l.* with him, and to board and lodge him, and teach him his trade. *Richard Roberson* the younger returned to *Sandhurst*, and informed his father and brother *George* what had taken place, and his father agreed to pay the 5*l.* if the pauper suited, and *George* the master agreed that the pauper should go to *Thorpe's*. The pauper went accordingly to *Thorpe's* at *Battle*, and having stayed the month, took a note from Mr. *Thorpe* to his father to say he might remain on the terms agreed on, and the father thereupon sent the 5*l.* by the pauper, who continued with him at *Battle*, receiving board, lodging, and instructions from him in the art of a shoemaker, according to his agreement,

until the expiration of two years, which took place in *July*, 1823. The indentures were retained by the master *George Roberson* until a few months before the expiration of the two years, when *George* the master met the pauper at their father's house, and *George* then told the pauper he was his apprentice, and that he could claim him after he had left Mr. *Thorpe's*, for that he would leave *Thorpe's* in *July*, and that his time would not be up until *November*. The pauper said he did not think it would be right for him to do so, and *George* then agreed to give the pauper out of his time. The following memorandum was indorsed on the indentures of apprenticeship which were given up: "*George Roberson*, the master of *Benjamin Roberson*, his apprentice, do, by consent of his father, give him out of his time, this 5th day of *April*, 1823, on account of not having employment for him." This memorandum was signed by *George Roberson* the master, *Richard Roberson* the father, and the pauper. In 1834 the pauper became chargeable to the parish of *Battle*, and was removed with his family from thence to *Sandhurst*, and against this order of removal *Sandhurst* appealed. Upon the above facts, the Court of Quarter Sessions handed down to the Clerk of the Peace the following memorandum: "The Court are of opinion that the service in *Battle* was not in pursuance of the indentures of apprenticeship entered into by the pauper with his brother, but that the pauper continued settled by his prior service in the parish of *Sandhurst*, and therefore adjudge that the said order be confirmed, subject to a case for the Court of King's Bench;" and directed the conclusion, as above stated, to be inserted in the case.

Theniger and *W. H. Watson*, in support of the order of Sessions.—Here there was a distinct and fresh engagement with the second master, the object of which was the instruction of the pauper, as was shewn by payment of the premium of 5*l.*; and the second master was not cognisant of the indentures. The case therefore falls within the principle of *Rex* v. *Christowe* (*a*), and the authorities are uniform, that the knowledge of the fact of apprenticeship is requisite on the part of the second master. It is true that in *Rex* v. *Banbury* (*b*), *Littledale*, J. seems to intimate that such knowledge is immaterial, but his opinion is extra-judicial. Lord *Denman*, C. J., in that case observes, "The third master, as well as the second, must be taken to have known that the relation of master and apprentice subsisted between *Hobbs* and the pauper;" and *Parke*, J., who dissented from the rest of the Court, appears to have grounded his dissent on the contrary assumption, *viz.*, that the second and third masters did not know of this relation. In all the cases, it either appears that there was such knowledge, or it may be inferred from the circumstances; *Rex* v. *Bradstone* (*c*), *Rex* v. *Bradninch* (*d*), *Rex* v. *Shebbear* (*e*). In *Rex* v. *Holy Trinity in the Minories* (*f*), it must be inferred that the second master knew of the existence of apprenticeship, for the period of service with him corresponded with the unexpired term of the apprenticeship. The same doctrine is laid down in 1 *Nolan*, 580. There are two cases before *Rex* v. *Banbury*, where no knowledge existed of the previous indentures, and that circum-

(*a*) 11 East, 95.
(*b*) 5 B. & Ad. 176.
(*c*) Bur. S. C. 662. 2 Bott. 434, Pl. 459.
(*d*) 2 Bott. 430, Pl. 456. 1 Nol. P. L. 507.
(*e*) 1 East, 73,
(*f*) 3 T. R. 605.

stance was insisted upon as shewing that the second service was not under them; *Rex* v. *Ashby de la Zouch* (*h*), *Rex* v. *Whitchurch* (*i*). Without such knowledge it is impossible for the master to exercise the proper control over the apprentice. In *Rex* v. *Ecclesfield* (*j*), the service, as here, was in the character of apprentice, yet the Court held that no settlement was gained. The true principle is that laid down by Lord *Tenterden* in *Rex* v. *Shipton* (*k*). If during the term of apprenticeship the apprentice hires himself to a stranger to the indenture, the service is not referable to the indenture. The Sessions have found here that the second service was not in pursuance of the indentures, and this Court will not disturb their finding.

Darby and *G. F. Jones*, *contrà*.—*Rex* v. *Christowe* (*l*), differs wholly from this, because there an entirely independent engagement under seal was entered into with the second master. So in *Rex* v. *Ecclesfield* (*j*). Here the service to the second master was dependent wholly on the engagement with the first. The circumstance of the ignorance of the second master is never referred to, save as affording an argument that the service is not in furtherance of the engagement with the first. It is never considered as a circumstance at all material in itself. This explains and reconciles all the cases. There is no instance of a case sent back to the Sessions to ascertain the fact of the knowledge of the second master, though there are many cases where it can only be matter of inference; and in *Rex* v. *Offerton* (*m*), it is said that such knowledge was probable only. *Rex* v. *Banbury* (*n*) must be overturned if it be a necessary fact. This is the only case in which the question is brought directly for the Court to decide whether this knowledge is a necessary ingredient in the case or not. The performance of the covenant by the first master is not necessarily affected by the knowledge of it on the part of the second. If an action of covenant had been brought against the first master for not teaching under the indentures, to which performance was pleaded, it would be no answer to the plea to shew want of knowledge of the existence of the indentures in the second master. Such a fact would be wholly immaterial. The only question here is, whether the residence with the second master was in pursuance of the indenture, and in a place where, but for the indenture, the pauper would never have been, and the facts tend to shew most clearly that it was so; for the pauper was not allowed at all to act as *sui juris* in the matter. The master sends some one to make the bargain, which distinguishes this case from *Rex* v. *Ashby de la Zouch* (*h*), and *Rex* v. *Shipton* (*k*). Lastly, this question is properly one of law. Whether or not the service was in pursuance of the indentures, is not a fact, but an inference of law arising from many facts, and therefore properly within the province of this Court to decide; *Rex* v. *Banbury* (*n*); *Rex* v. *Shipton* (*k*).

Cur. adv. vult.

Lord DENMAN, C. J., in this term delivered the judgment of the Court as follows:—The question in this case is, whether the pauper having been regu-

(*h*) 1 B. & A. 116.
(*i*) 1 B. & C. 574.
(*j*) 6 M. & S. 173.
(*k*) 8 B. & C. 88.
(*l*) 11 East, 95.
(*m*) Bur. S. C. 802.
(*n*) 5 B. & Ad. 176.

larly bound apprentice to his brother in the parish of *Sandhurst*, and having served him there, has gained a settlement by subsequently serving a second master in the parish of *Battle*, during the period of apprenticeship. In this case the first master expressly consented to the particular service with the second; and that service was on the express oral contract that the second master was to board and lodge the pauper, and to teach him his trade, being the same trade as the first master carried on. It was therefore so far in furtherance of the indenture of apprenticeship, as that the two objects of that indenture, namely, the maintenance and teaching of the apprentice, were provided for. It was also expressly agreed between the first master, the pauper, and his father, that the indenture should not be given up; neither was it in point of fact given up, until long after the pauper had served the second master for forty days. It is therefore perfectly clear, according to the decided cases, that as between the first master and the pauper, the service to the second master was under the indenture, the relation of master and apprentice still subsisting between them, and the covenants in the indenture being performed on both sides by the teaching and maintaining by, and the service with, the second master. But it is found in terms, that the second master did not at any time during the service know that the pauper was an apprentice, and the only point in the case is, whether it is material that the second master should know that fact.

Upon examination of the older cases upon this subject, it will be found, that in some of them the second master did not know the fact; in others, it may be doubtful whether he did or did not; but in none of them is such knowledge expressly negatived. No point is however made in any of them upon the knowledge or ignorance of the second master, until the case of *Rex* v. *Ashby de la Zouch* (*o*), followed up by *Rex* v. *Whitchurch* (*p*); but neither of those cases turns upon the point, inasmuch as in the former case the Sessions negative the consent of the first master to the particular service, which is clearly necessary; and in the latter such consent was plainly never given. In the subsequent case of *Rex* v. *Banbury* (*q*), it seemed doubtful whether the second master knew the fact, and the Court differed in opinion, both as to the fact of knowledge and its materiality. It can hardly be said upon these authorities that there is any clear and express decision upon this point. The question arises on the stat. 3 Will. & Mary, c. 11, s. 8, which enacts, "That if any person shall be bound an apprentice by indenture, and inhabit in any parish, such binding and inhabitation shall be adjudged a good settlement." The word service is not mentioned in the statute; but binding and inhabitation, as was observed in the case of *Rex* v. *Linkinhorne* (*r*), and other cases. The true construction to be collected from the cases appears to be, that it will be sufficient if the residence be in pursuance of the contract of apprenticeship; and in some way or other in furtherance of the object of the apprenticeship. Here the residence was in furtherance of the object of the apprenticeship, *viz.*, maintenance and teaching; it was in pursuance of the contract, for the first master having no employment, consented to the service with the second, that by these means he might perform his covenant; for having been

(*o*) 1 B. & A. 116.
(*p*) 1 B. & C. 574.
(*q*) 5 B. & Ad. 176.
(*r*) 3 B. & Ad. 413.

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in part taught by the first master, he is permitted to go to the second to have his education completed under the indenture. Of what consequence then can it be whether the second master knew that the pauper was an apprentice or not? What difference would such knowledge have made in the situation or relation of the parties? None whatever: it would not have created the relation of master and apprentice between the second master and the pauper; such relation could only be created by a regular assignment of the indenture (even supposing, for the purpose of the argument, that such would be the effect of an assignment of any other than a parish apprentice), or by the cancellation of it, and a new binding by another: it never subsisted, nor was intended to subsist, between the second master and the pauper, but continued uninterrupted between the latter and the first master. The dicta, indeed, of the learned judge in the cases of *Rex* v. *Ashby de la Zouch* (*s*), and *Rex* v. *Whitchurch* (*t*), seem to lead to the conclusion that they thought that the relation of master and apprentice must subsist between the second master and the pauper; for they say, how could he be serving as an apprentice, when it was not even known that he was an apprentice? But if the point had been necessary to the determination of those cases, we cannot doubt but that they would have seen that in the absence of a regular assignment the actual relation of master and apprentice could not be created, and that knowledge of the fact of the binding would in no way constitute such relation. The expression "serving as an apprentice," if it be understood with reference to the object of apprenticeship, namely, the being taught, and as distinguished from serving generally without such object, is quite correct; and it is obvious that in such sense the pauper in this case, under the oral contract for teaching, was "serving as an apprentice;" but it is equally obvious that this did not in any respect depend on his master's knowing that he was an apprentice, but upon the nature of the contract which he made. The second master is in some measure substituted for the first; inasmuch as the first consents that the apprentice shall learn from the second that which he has himself covenanted to teach; yet the second master need not be bound by the same engagements as the first, for if he need, then no service to a second master could be sufficient, except by a regular transfer of the contract, that is the indenture, to hold which would be contrary to all the decisions as to the service with a second master by consent of the first. It may be observed, that in *Rex* v. *Banbury* (*u*), my brother *Parke* gave only this effect to the decisions in *Rex* v. *Ashby de la Zouch* (*s*), and *Rex* v. *Whitchurch* (*t*), that the second master's ignorance of the apprenticeship furnished strong evidence that the second service was unconnected with any apprenticeship. Possibly what is said in those two cases as to the knowledge of the second master may be supported on that ground: we think it cannot, as establishing the doctrine now brought into question; as to which doctrine this further remark is to be made, that my brother *Littledale*, considering the precise question on principle, in *Rex* v. *Banbury* (*u*), declared a distinct opinion that the second master's knowledge of the apprenticeship is not necessary. Upon the whole, we are of opinion that the true question in all such cases is, whether the service to the second master is a constructive service to the first master under

(*s*) 1 B. & A. 116.
(*t*) 1 B. & C. 574.
(*u*) 5 B. & Ad. 176.

the indenture, as between him and the apprentice, and that to the solution of that question it is wholly immaterial whether the second master knew of the apprenticeship or not. The order of Sessions must be quashed.

Order of Sessions quashed.

The KING *v.* The Inhabitants of HENLEY-UPON-THAMES.

Jan. 25.

Pauper since the passing of 59 G. 3, c. 50, rented and occupied two granaries in different parts of the same parish at 4*l.* and 7*l.* a year respectively, for more than a year, and paid the whole rent. Each granary formed the entire upper floor of a detached building in a yard. There was no communication between the granary and the rest of the building in either case, nor any access to it except from the outside by means of a moveable ladder placed in the yard:—*Held*, That the granaries were not distinct buildings within the above statute, and that no settlement was gained.

ON appeal against an order for the removal of *Matthew Chipp*, &c. from the parish of *Henley-upon-Thames*, in *Oxfordshire*, to the parish of *Burghfield*, in *Berkshire*, the Sessions quashed the order, subject to the opinion of this Court, upon the following case:—

The pauper, *Matthew Chipp*, acquired a settlement previous to 1819 in the appellant parish of *Burghfield*. In the year 1821, the pauper being in trade as a mealman, and resident in the respondent parish of *Henley-upon-Thames*, hired of a person of the name of *Paulin* a granary, at the rent of 4*l.* a year. The granary was an upper one, forming one entire floor, and above a granary which stood on a yard, belonging to a dwelling-house of the said *Paulin* in *Henley*, which yard opened by a gateway on the high road. The two granaries adjoined to, and were under the same roof with a stable, and were detached from the said dwelling-house. There was no internal communication between the lower granary and the upper granary, or between the upper granary and the stable; the only entrance to the upper granary being a separate and distinct entrance from the outside, by means of a moveable ladder placed in the yard, and reaching from the ground to a door on the side of the same granary. In the year 1822, whilst the pauper still held this granary, he hired of one *Major* another granary or loft, in the said parish of *Henley*, at the rent of 7*l.* a year. The last-mentioned granary was one entire floor, and was over a stable in a yard, behind the dwelling-house of the said *Major*. The stable and granary were detached from the last-mentioned dwelling-house. There was an approach to them without entering the dwelling-house. There was no internal communication between the stable and granary; the only entrance to the granary being a separate and distinct one from the outside, by means of a moveable ladder placed in the yard, and reaching from the ground to a door in the side of the granary. The pauper held both the granaries above mentioned together, for more than a year; and during that time the rent for the same was duly paid by the pauper, who during all that time resided in *Henley*.

The question for the opinion of this Court was, whether upon these facts the finding is warranted that the two granaries mentioned were separate and distinct buildings within the meaning of the statute 59 Geo. 3, cap. 50. If the Court should be of opinion that the two granaries were separate and distinct buildings within the meaning of that statute, the order of Sessions to be confirmed; if otherwise, the order of Sessions to be quashed.

Chilton, in support of the order of Sessions, contended, that the two granaries rented by the pauper were separate and distinct buildings, either of which,

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if used as a dwelling place, might be the subject of burglary; that a settlement was therefore gained under the 59 G. 3. c. 50. He cited *Rex* v. *Macclesfield* (a), *Rex* v. *Iver* (b), and *Rex* v. *Weston* (c).

Mude, contra (with whom was *Cooper*).—No meaning is given to the words "separate and distinct building" in the statute, unless the occupation of an upper floor, by whatever means access to it may be obtained, whether by staircase or ladder, be rejected as a mode of gaining a settlement. The tenements in the cases cited were not separate floors, but separate houses.—He was then stopped.

Lord Denman, C. J.—We quite agree. No settlement has been acquired.

Coleridge, J., and Williams, J., concurred.

Order of Sessions quashed (d.)

(a) 2 B. & Ad. 870. (b) 1 Ad. & Ell. 228. (c) 1 Ad. & Ell. 232.

(d) See *Rex* v. *Cawerth & Biddock*, 2 Mau. & Sel. 100, where a distinct floor with a separate outer door was considered a distinct dwelling-house, for the purposes of gaining a settlement.

The King v. the Inhabitants of All Saints, Stamford.

Jan. 30th. Pauper being asked by a house-keeper whether he would have the ostler's place, and he would, and entered upon the service, for the duration of which no time was fixed. No other conversation took place at the hiring. Pauper continued in the service about five years, and until his master failed, when all the other servants left. Before the pauper left he had a dispute, when his master said "If you are dissatisfied with your place you may go whenever you like," and the pauper considered himself at liberty to leave, or liable to be turned away at any time. The Sessions, considering that the hiring was not a general or yearly hiring, confirmed an order for the pauper's removal, subject to the opinion of this Court. The Court held that the finding of Sessions was not necessarily wrong, and refused to disturb it.

ON appeal against an order for the removal of *Thos. Tomlinson* from the parish of *St. Martin, Stamford Baron*, to the parish of *All Saints, Stamford*, both in the county of *Leicester*, the Sessions confirmed the order, subject to the opinion of this Court upon the following case:—

The pauper had gained a settlement in the parish of *All Saints*, by renting a tenement, and some years afterwards being at the *Oak Inn* at *Grantham*, kept by one *Wilmer*, in the capacity of horse-keeper to another person, the ostler at that inn met with an accident and was killed. *Wilmer* asked the pauper whether he would have the ostler's place, and the pauper said he would, and entered upon the service. *No time* was fixed as to the duration of the service, nor did any other conversation take place between *Wilmer* and the pauper. The pauper boarded and lodged in *Wilmer's* house, but had no wages; he received the vales given by travellers to ostlers, and continued in *Wilmer's* service for about five years, at the end of which time *Wilmer* failed, and the inn being shut up, the pauper and all the other servants left it. Before the pauper left *Wilmer's* service a dispute arose with his fellow-servants, upon which his master said to him, "If you are dissatisfied with your place you may go whenever you like," and the pauper considered himself at liberty to leave, or liable to be turned away at any time. The Sessions were of opinion that the circumstances under which the pauper entered *Wilmer's* service did not amount to a general, or yearly hiring, and confirmed the order, subject to the opinion of this Court.

Thesiger and *Amos*, in support of the order of Sessions.—Here there has been a distinct and positive finding by the Sessions; this Court will therefore not interfere, unless it clearly appear that the evidence contradicts that con-

sion, or that there was no evidence to support it. *Rex* v. *Woolpit* (*a*), *x* v. *Great Wishford* (*b*).

I. Hildyard and *White*, *contrà*.—The evidence here does contradict the nclusion at which the Sessions have arrived. The hiring here was general, m which a hiring for a year must be implied. *Rex* v. *Wincaun-* (*c*). Then the hiring being in the first instance general, it rested upon e other side to limit the effect of that general hiring. This is like the case *Rex* v. *Berwick St. John* (*d*), where the pauper was desired to go into *d Hill's* place, and the Court held that to refer to the period for which *Hill* s hired, not to the kind of work he had to do. The expression, "you may when you like," must necessarily be referred to the dispute on the occasion which they were spoken. What passed then might or might not have ounted to a dissolution of the service by mutual consent at that time, but would not in either case destroy the effect of the general hiring, which took ace when the pauper entered the service. *Rex* v. *Stockbridge* (*e*), and *x* v. *Seaton* and *Beere* (*f*), are in point. The cases of *Rex* v. *Christ's rish* in *York* (*g*), and the *Rex* v. *Great Bowden* (*h*), may be relied by the other side; but the circumstances in them were different from those the present case. There the only question that could have arisen was, hether or not there was a hiring at all: if there was one, it must have been general hiring, the effect of which is the same as a hiring by a year.

Lord DENMAN, C. J.—I do not wish to interfere with the doctrine that a neral hiring is a hiring for a year. The question really is as Mr. *Hildyard* ates it, whether under these circumstances there could be no hiring. It is ite possible that there might not have been a hiring. The justices may ve known whether an ostler's place is, or is not, likely to be entered upon der a hiring. I think also that there is some evidence to shew that there as not any hiring at all. It appears that a dispute occurred between the uper and a fellow-servant, upon which the master said, "if you are dissatis- d with your place, you may go when you like." Taking this to apply to the iginal hiring, and that the pauper acquiesced, it would be evidence to shew at there never was a binding obligation between the parties at all. I think, erefore, it is quite possible that the Sessions may have determined correctly the facts submitted to our consideration, coupled with the information they ay possibly have possessed.

WILLIAMS, J.—The Sessions have found this was not a hiring. The cases ferred to by Mr. *Hildyard* are very strong to shew that when no time is entioned an indefinite hiring is contemplated, which is a hiring for a year. f the Sessions had come to another conclusion in this case, perhaps I should ve been quite as well satisfied, but that is not the question; it is, whether or ot we can say that on the face of the case there is any reasonable ground pon which they might have come to their conclusion? For the reasons my ord has given, I think there is.

(*a*) 4 Ad. & Ell. 205.
(*b*) 4 Ad. & Ell. 216.
(*c*) Bur. S. C. 299.
(*d*) Bur. S. C. 502.
(*e*) Bur. S. C. 759.
(*f*) 2 Bott. 297. Cald. 440.
(*g*) 3 B. & C. 459.
(*h*) 7 B. & C. 249.

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The KING v. The Inhabitants of ALL SAINTS.

COLERIDGE, J.—I do not think we are at liberty to disturb the order of Sessions. The respondents had made out their case. The appellants were to get rid of that by proving affirmatively (for the burden of proof lay on the appellants) that a subsequent settlement had been obtained by hiring and service. There is no difference, in point of law, between Mr. *Hildyard* and the Sessions, for the Sessions treat a general hiring and a yearly hiring as the same thing in law; and it is clear that they did not consider what had passed as either the one or the other. The question is, did the appellants offer evidence from which a general hiring could alone be inferred? For, if not, according to the decided cases, the order must stand. Mr. *Hildyard* says that they did. He says that there was a hiring, that the party entered into the service, and that no time was fixed for its duration. But that is only stating half the facts. The first finding is a positive and substantive finding, that the pauper entered into the ostler's place. That alone might be taken to be a hiring. The circumstance that no time was fixed may have meant that no particular time was fixed for the duration of the service, as being sufficiently defined by the term ostler's place. But then he ought to have gone on to shew generally in reference to former takings or other circumstances that a yearly hiring was necessarily implied, as in the case referred to: "will you go into *Hill's* place?" There it was distinctly proved that *Hill* had been hired for a year. There was no such proof in this case. Then is there no evidence the other way? I think there is: it has been already alluded to by my Lord; I mean what took place on the occasion of the dispute. I do not deny that the conversation may have referred to what then took place as well as to the original hiring, but this is not enough for Mr. *Hildyard*. If it may so refer to the original hiring, the finding of the Sessions may be right, and that being so, there is nothing to warrant us in disturbing it.

Order of Sessions confirmed.

Jan. 25th.

The KING *v.* the Inhabitants of SNAPE.

Pauper in 1817 was engaged to take care of stock. He was to receive 12*s.* a week, and to have the keep of 1 cow, 4 sheep, and 2 pigs on the lands of his master, and also to occupy (rent free) a house upon the premises, which had been built for and always occupied by the overlooker of the stock. He was to go into the house at Michaelmas, and when he commenced taking charge of the stock it was stipulated that he should not be obliged to leave the house without notice to quit at Michaelmas. He tended the stock and occupied the house for nine years under this agreement. The Sessions found that the pauper occupied as servant, but stated a case for the opinion of the Court. The Court, considering that the finding was not necessarily wrong, refused to disturb it.

ON appeal against an order for the removal of *Abigail*, widow of *William Alexander*, from the parish of *St. Osyth*, in the county of *Essex*, to the parish of *Snape*, in the county of *Suffolk*. The Sessions confirmed the order, subject to the opinion of this Court, upon the following case:—

In 1817, *William Alexander*, then a servant in the employ of *William Dawson*, was engaged by him to take care of his stock upon the marshes of *St. Osyth*. It was agreed that he should receive twelve shillings a week wages, the keep of one cow, of four sheep, and of two pigs upon the marshes, and for this he was to occupy (rent free) a certain house situate upon the marshes. This house had been originally built for, and had always been appropriated to, the use of the person who looked after the stock upon the marshes, and was never let to any other person. The pauper's husband was to go into the house at Michaelmas, and at the time he commenced to take

care of the stock on the marshes it was stipulated, at his express desire, that he should not be obliged to leave the house unless he had notice to quit at Michaelmas. He took charge of the stock and entered into possession of the cottage in 1817, and resided in it for more than nine years, during which time he had no other employment than taking care of the stock. The Sessions found that, without the cottage, the keep of a cow, four sheep, and two pigs, given to the pauper's husband under the above agreement, was not a tenement of sufficient value to confer a settlement, and were also of opinion, upon the facts above stated, that the occupation of the cottage was an occupation by him in the character of a servant and connected with the hiring, and not an occupation as a tenant. If the Court should be of opinion that the Sessions arrived at an improper decision with respect to the cottage, the order of Sessions was to be quashed, otherwise to stand confirmed.

Ryland and *Turner*, in support of the order of Sessions, were stopped by the Court.

Knox, *contrà*.—The facts stated in this case having occurred before the passing of the first tenement act, 59 Geo. 3, c. 50, there was no necessity for the renting of the tenement by the pauper. The simple occupation by her husband, in the character of tenant, would have been sufficient to have conferred a settlement. The only point, therefore, to be ascertained was, whether or not there was such an occupation. The agreement shews that there was. The objects of it were two-fold—to ascertain the wages, and to secure the pauper's husband from being turned out of the house without notice, and this conferred upon him an interest which distinguishes the present from all other cases. If the master had omitted to give the notice to quit the house at the proper time, the man might have held on for a year, although dismissed from the service. That shews that the occupation cannot be said to have been exclusively for the purposes of the service. In almost all the other cases the servant has occupied part of the premises of the master, and the occupation could last only during the time of the service. It was so in *Rex* v. *Cheshunt* (*a*), which may be relied on by the other side. But here an interest existed independent of it, and of such a nature as was sufficient to give a settlement. The intention of the parties is indicated by the word "notice." Had the party been considered as a servant only, "warning" would have been used. The occupation cannot be said to be more exclusively for the performance of a service than residence by a curate, yet such a residence has been held to confer a settlement. *Rex* v. *St. Mary, Newington* (*b*). As to the finding of the Sessions, this Court will not be bound by it, if it is contradicted by the facts set out in the case. Here the Sessions desired to have the opinion of the Court, and that cannot be obtained unless they previously find one way or other.

Lord DENMAN, C. J.—In my view of this case there would be no holding of this house as a tenement until the service expired, construing the agreement most favourably to Mr. *Knox*. But I do not know when it expired. I do not know that the house was so held a single day. Suppose we construe it another way: that the party was not to be compelled to leave the house

(*a*) 1 B. & A. 473. (*b*) 5 B. & Ad. 540.

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unless he had notice to quit at Michaelmas. Notice to quit what? Not the house merely; it may be the house and service too. The stipulation may be merely that he was to leave both house and service in case his master chose to put an end to the service, but that Michaelmas should be the only period at which such notice should become effective. Then the Sessions have found that the holding was always that of a servant, and it does not seem to me that they were wrong in coming to that conclusion.

WILLIAMS, J.—I think that it is quite enough for our decision to say, we do not see that the justices have come to a wrong conclusion. For though Mr. *Knox* argues that, where they find a fact, as they must, and state a case for our opinion, if they were clearly and palpably wrong, we are not bound to adhere to it; yet I would by no means be over-nice and critical in examining whether they are right or wrong, provided there was evidence to support their conclusion. That seems to be the case here, because, granting to Mr. *Knox* the uttermost of his argument, all that can be said is, that the stipulation in the agreement had rather a tendency to the contrary of their finding,—still not so conclusively to the contrary as to induce me to say they were wrong. It might have been explained on the ground that this was an indulgence asked for by the man and conceded to him without his having any right as a tenant at all.

COLERIDGE, J.—The Sessions in this case had the agreement before them; they were to draw their conclusion partly of law and partly of fact from that agreement. Mr. *Knox* cannot succeed unless he satisfies us that the Sessions have necessarily drawn a wrong conclusion. If the agreement admit of the conclusion which they have drawn, I think we ought not to disturb that conclusion. The question in substance was upon an agreement between a master and a servant; their decision had also reference to the service, and the wages for that service. Those wages might consist partly of money and partly of keep, and partly of the occupation of a cottage, and as to that last circumstance, the pauper may have said, since part of his remuneration was to be the occupation of a house, it would be very inconvenient for him to be turned out without any notice, and as he would ordinarily be dismissed from the service at Michaelmas, have asked not to be turned out, except on a notice to quit at Michaelmas. I would assume, for the purpose of Mr. *Knox's* argument, that a six months' notice was meant, the same notice which a tenant would have received. That may or not have been so. If so, still it is capable of the construction put by the Sessions when all the facts of this case are considered. It appears to me, therefore, that the finding of the Sessions may well be supported.

Order confirmed.

Ex parte SENIOR.

W. H. WATSON applied on the second day of Term for leave to give the notice required by the rule of H. T. 6 W. 4, s. 5 (*a*), of the intention of Mr. *Senior* to apply to be examined in next Easter Term, for the purpose of being admitted an attorney, and of having his name affixed to the list outside the Court. Mr. *Senior*, who was clerk in an attorney's office, had given the requisite notices, in compliance with the rules, which entitled him to be examined this Term, preparatory to his admission; but within three days before the commencement of this Term he had received intimation from the attorney in whose employment he was, that he must go abroad on some business connected with his office. This would probably be at the time when the examination would take place, so that he could not be examined. As he received the intimation within three days before this Term, he was unable to give fresh notice, so as to comply with the rule H. T., 6 W. 4, s. 5, in order for his examination next Easter Term. Under these circumstances, the present special application was rendered requisite.

Proper notice having been given according to the rule of H. T. 6 W 4, for the admission of a person as an attorney in a term when he subsequently found he could not be present for examination, leave was given him to give a fresh notice after the commencement of the term, for admission the following term.

PATTESON, J.—It is a sort of continuation of the notice under the particular facts of the case. I think, under the circumstances, it may be done.

Rule granted.

(*a*) 1 Har. & Wol. 639.

WILSON *v.* HAWKINS.

HINDMARSH moved for a rule to set aside an order of *Littledale*, J., by which the assignment of the bail bond in this case, and all subsequent proceedings thereon, were set aside.—This question turns on the sufficiency of the notice of justification of bail. The notice was served on *Friday* the 25th of *Nov.* at half past six P. M. for justification, at chambers, on *Monday* the 28th, at eleven o'clock. The plaintiff treated it as a nullity, and proceeded on the bail bond. This one clear day's notice only, as the intervening *Sunday* does not reckon, it is submitted is not sufficient. The case of *Staines* v. *Stoneham* (*a*) was cited at chambers, to show that one day's notice was not sufficient; but *Littledale*, J., thought that case might have been a case of added bail, which was not the case here, and therefore made the order, that the question might come before the Court. On inquiring into that case, it has been found not to have been a case of added bail. There is no settled practice as to what notice is requisite when the justification is to take place *at chambers*, and it is submitted, that this notice is not sufficient in those cases. The rule of H. T., 2 W. 4, I. 16 (*b*), does not *require* two days' notice, but merely says it shall be *sufficient*.

In this Court one day's notice of justification of bail at chambers is sufficient if it is the original bail.

Cur. adv. vult.

(*a*) 4 Dowl. P. C. 678. 2 Cromp. M. & Ros. 658. 1 Gale, 327. (*b*) 1 Dowl. P. C. 185.

[illegible]

Patteson, J. the next day gave judgment.—I have inquired as to the practice in this case, and find that the practice in this Court has always been to require new bail's notice of justification, where the same bail justify, and new bail's notice in the case of added bail. It is immaterial what is the practice of the Court of Exchequer, and it is also immaterial whether the justification is in open Court or at chambers. There must therefore be no rule in this case.

Rule refused.

Ex parte Vaughan.

An articled clerk to an attorney who was prevented by illness from serving the last nine days of his time, which nine days he made up, after his recovery, allowed to be admitted an attorney.

Kelly moved for a rule that the service of an articled clerk should be deemed good service, and that he should be allowed to be examined for admission as an attorney of the Court. He first served part of his time with an attorney in the country, to whom he was articled. On the attorney leaving this kingdom, he served another part of his time with his town agent, while an assignment of his articles was being prepared, and with the same person a still further time under the assignment. He then went to serve the remainder of his time with a practising barrister, under the statute 1 & 2 G. 4, c. 48, s. 2, but nine days before the expiration of his time he became dangerously ill, and was obliged to go into the country for about five months; when he recovered, he returned and served more than the nine days with the same practising barrister. The only question was, whether the dangerous illness of the party was a sufficient excuse for not serving the last nine days of his time. The cases of *Ex parte Matthews* (a), and *Ex parte Hubbard* (b), were cited, as authorities for the application.

Patteson, J. In the first of those cases the party was not even required to make up the time by subsequent service, which has been done in this case. I think the rule may be granted.

Rule granted.

(a) 1 Barn. & Adol. 160. (b) 1 Dowl. P. C. 438.

Catton v. Faiers.

The Court will grant only a rule nisi in the first instance for a procedendo, a cause having been removed from an inferior Court without the proper recognizance having been entered into, even where it appears on the return to the certiorari that the sum demanded was under 20l.

THIS was an action commenced in the Recorder's Court at *Cambridge*, and by the plaint it appeared the sum demanded was 19*l.* 19*s.* The cause was removed by *certiorari* into this Court, and by the Recorder's return to the *certiorari*, it also appeared the sum demanded was 19*l.* 19*s.*

Byles applied for a *procedendo*, no recognizance having been entered into as required by the stat. 7 & 8 G. 4, c. 71, s. 6, on the removal of actions for causes under 20*l.*, and submitted he was entitled to have a rule absolute in the first instance. It appeared that in the cases which were reported, a rule

nisi only was granted, but the present case differed from them all, by it appearing on the Recorder's return that the cause of action was under 20*l.*

PATTESON, J.—I do not like to make a precedent, and therefore you can have a rule *nisi* only.

Rule *nisi* granted.

GODFREY *v.* CLEMENTS.

If the date when the writ issued is omitted on the record, as required by the rule H. T. 4 W. 4, evidence may nevertheless be given as to when it issued.

THIS was an action of covenant on a mortgage, and for the non-payment of the interest. The defendant pleaded that on, &c. and before the commencement of the suit the interest was paid, on which plea issue was joined. The time when the writ issued being thus material, on the trial of the cause before the Secondary, it appeared that that time was omitted on the record as required in the form given in the rule of H. T., 4 W. 4 (*a*). It was proved that the payment was made, and as the person who made the payment said he came to settle the action, it was inferred to have been after the action was commenced. It was then objected on the part of the defendant, that the plaintiff was not entitled to the verdict, as the date when the writ was sued out ought to appear on the record. The Secondary overruled the objection, and directed a verdict should be entered for the plaintiff for 1*s.*, giving the defendant leave to move on the point.

Platt now moved accordingly.

PATTESON, J.—The form of the issue given in the rule of H. T., 4 W. 4, directs that the date when the writ issued should be inserted, but I am not aware that, if it is omitted, evidence cannot be given of the time when the writ was issued. I think therefore that I cannot grant this rule.

Rule refused.

(*a*) 2 Dowl. P. C. 327.

LEWIS *v.* WINTER.

A cause was referred to an arbitrator by order of *nisi prius*, and before he made his award the defendant in whose favour the award was, died; leave was given the next term to enter up judgment as of the term in which he died.

THIS was an action of trespass, *quare clausum fregit*, which was referred by consent to arbitration, by an order of *nisi prius*, a verdict being taken for the plaintiff. The cause alone was referred, with power to the arbitrator to enter a verdict for the plaintiff or for the defendant, and to order what should be done by either party respecting the matter in dispute, "so as the said arbitrator shall make and publish his award in writing, concerning the matters referred, ready to be delivered to the said parties, or either of them, or if they or either of them shall be dead before the making of the said award, to their respective personal representatives, who shall require the same, on or before, &c." There was no express condition in the order that the death of either party should not be a revocation of the arbitrator's authority. The dispute

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was concerning the boundary of some land, and the arbitrator awarded a verdict to be entered for the defendant, and also awarded how the boundary should in future run. The defendant died on the 24th of *Nov.*, and the award was made on the 28th.

Andrews, Serjt., on the authority of *Clarke* v. *Crofts* (*a*), obtained a rule *nisi* for leave to sign judgment for the defendant as of Michaelmas Term last.

Channel and *Gurney* shewed cause in the first instance.—The practice used formerly to be, not to put a condition in the order of reference, that the death of either party should not be a revocation of the arbitrator's authority. Under that practice it was held that if the cause only was referred, the death of a party did not operate as a revocation, but if other matters also were referred, that it did (*b*). Now this order does not contain such a condition, and as more than the cause was referred, the arbitrator having to direct what was to be done between the parties, and as he has accordingly made an award respecting the boundaries, the direction in the order of reference that the award should be delivered to the personal representative, cannot authorize the arbitrator to proceed with the reference, and make an award that shall bind the heirs, as this order about the boundaries may. The defendant, moreover, is not at liberty to have his rule in the form now sought for; he may have leave to enter up the verdict if that is necessary, but there is no authority for this rule.

Andrews, Serjt., and *Fish*, *contrà*.—The case of *Clarke* v. *Crofts* is an express authority to shew, that after an order of *nisi prius* like the present, the death of a party is no revocation. A verdict may be entered for the defendant under the order of reference, according to the award, without the leave of the Court, and the Court will in consequence also grant this rule.

PATTESON, J.—I think this is the proper form of rule, as the leave of the Court is not required for entering a verdict. How far the heir is bound by this award, is another question, but as the party applying is entitled to have a verdict entered for the defendant, I think he is therefore entitled to have leave to enter judgment *nunc pro tunc*.

Rule absolute.

(*a*) 4 Bing. 143.
(*b*) *Rhodes* v. *Haigh*, 2 Barn. & Cress. 345. 3 Dowl. & Ryl. 608; and *Bower* v. *Taylor*. *Id.* note.

The KING *v.* The Paving Commissioners of the Parishes of St. MARGARET, and St. JOHN, WESTMINSTER.

One of a board of paving commissioners having entered into a contract to do some work for the board, the Court refused a mandamus directing them to advertise for fresh tenders to do the work.

THE defendants were appointed under a local act of Parliament, 22 G. 3, c. 44, by which it was enacted, that no person should act as a commissioner who was engaged in any contract to do any work for the board. There was also a penalty attached to any person who so acted, but there was no

ause declaring that any contract entered into by a Commissioner should be id. In *August* last the Board of Commissioners advertised for tenders for ving certain parts of the parish. Three tenders were sent in, one of which as by one of the Commissioners. That sent in by the Commissioner was ac- pted, though it was sworn on this application not to have been the best for e parish.

Wordsworth now applied for a *mandamus* directed to the Commissioners, ommanding them to advertise for fresh tenders. He contended that a *man- amus* would be the only way to remedy or prevent such misconduct as that nputed to the Commissioners.

PATTESON, J.—The effect of this contract will only be to prevent the con- actor acting as a Commissioner, and if he has acted since he entered into the ntract, he may be proceeded against for the penalty; but as there is no pro- ision in the act making such a contract void, I cannot interfere by *mandamus* s required. If the Commissioners have committed a breach of public duty entering into this contract, they may be proceeded against criminally.

Rule refused.

DOE, d. TOMKINS, *v.* ROE.

1. Service of a declaration in ejectment on an agent of a tenant who is in the kingdom is not a good service.

2. Service on one of several partners in a firm who were tenants is good.

TOMLINSON moved for judgment against the casual ejector. The notice at the foot of the declaration was addressed, amongst others, to *Heathcote*, nd a firm of *Unwin* and Company. A copy of the declaration had been erved on a person who admitted he was agent to *Heathcote*, who was in a listant part of the country. This, it was submitted, was sufficient on the uthority of the case of *Doe* v. *Roe* (*a*), referred to in *Tidd's* Practice (*b*). Another copy had been served on a person who acknowledged himself to be a partner in the firm of *Unwin* and Company.

PATTESON, J.—The service on the partner in the firm is sufficient. The other was only served on the agent of a person who was in the country, and who might therefore have been served. In the case referred to, the tenant was abroad. There also a copy was fixed on the premises, which does not appear to have been done in this case. I cannot grant even a rule *nisi* as to that one.

Rule absolute as to the others.

(*a*) 4 Barn. & Ald. 653.
(*b*) *See* also *Doe*. d. *Treat*, v. *Roe*, 1 Har. & Wol. 526. 4 Dowl. P. C. 278, and *Doe*, d. *Sturch*, v. *Roe*, 1 Har. & Wol. 672.

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if used as a dwelling place, might be the subject of burglary; that a settlement was therefore gained under the 59 G. 3, c. 50. He cited *Rex* v. *Macclesfield* (*a*), *Rex* v. *Iver* (*b*), and *Rex* v. *Wootton* (*c*).

Maule, *contrà* (with whom was *Cooper*).—No meaning is given to the words "separate and distinct building" in the statute, unless the occupation of an upper floor, by whatever means access to it may be obtained, whether by staircase or ladder, be rejected as a mode of gaining a settlement. The tenements in the cases cited were not separate floors, but separate houses.—He was then stopped.

LORD DENMAN, C. J.—We quite agree. No settlement has been acquired.

COLERIDGE, J., and WILLIAMS, J., concurred.

Order of Sessions quashed (*d*.)

(*a*) 2 B. & Ad. 870. (*b*) 1 Ad. & Ell. 228. (*c*) 1 Ad. & Ell. 232.
(*d*) See *Rex* v. *Usworth* & *Biddick*, 2 Harr. & Woll. 100, where a distinct floor with a separate outer door was considered a distinct dwelling-house, for the purposes of gaining a settlement.

Jan. 25th.

Pauper being asked by a horse-keeper whether he would have the ostler's place, said he would, and entered upon the service, for the duration of which no time was fixed. No other conversation took place at the hiring. Pauper continued in the service about five years, and until his master failed, when all the other servants also left. Before the pauper left he had a dispute, when his master said, "If you are dissatisfied with your place you may go whenever you like;" and the pauper considered himself at liberty to leave, or liable to be turned away at any time. The Sessions, considering that the hiring was not a general or yearly hiring, confirmed an order for the pauper's removal, subject to the opinion of this Court.

The Court *Held* that the finding of Sessions was not necessarily wrong, and refused to disturb it.

The KING *v.* the Inhabitants of ALL SAINTS, Stamford.

ON appeal against an order for the removal of *Thos. Tomlinson* from the parish of *St. Martin*, *Stamford Barm*, to the parish of *All Saints*, *Stamford*, both in the county of *Leicester*, the Sessions confirmed the order, subject to the opinion of this Court upon the following case:—

The pauper had gained a settlement in the parish of *All Saints*, by renting a tenement, and some years afterwards being at the *Oak Inn* at *Grantham*, kept by one *Wilmer*, in the capacity of horse-keeper to another person, the ostler at that inn met with an accident and was killed. *Wilmer* asked the pauper whether he would have the ostler's place, and the pauper said he would, and entered upon the service. *No time* was fixed as to the duration of the service, nor did any other conversation take place between *Wilmer* and the pauper. The pauper boarded and lodged in *Wilmer's* house, but had no wages; he received the vales given by travellers to ostlers, and continued in *Wilmer's* service for about five years, at the end of which time *Wilmer* failed, and the inn being shut up, the pauper and all the other servants left it. Before the pauper left *Wilmer's* service a dispute arose with his fellow-servants, upon which his master said to him, "If you are dissatisfied with your place you may go whenever you like," and the pauper considered himself at liberty to leave, or liable to be turned away at any time. The Sessions were of opinion that the circumstances under which the pauper entered *Wilmer's* service did not amount to a general, or yearly hiring, and confirmed the order, subject to the opinion of this Court.

Thesiger and *Amos*, in support of the order of Sessions.—Here there has been a distinct and positive finding by the Sessions; this Court will therefore not interfere, unless it clearly appear that the evidence contradicts that con-

clusion, or that there was no evidence to support it. *Rex* v. *Woolpit* (*a*), *Rex* v. *Great Wishford* (*b*).

J. Hildyard and *White*, *contrà*.—The evidence here does contradict the conclusion at which the Sessions have arrived. The hiring here was general, from which a hiring for a year must be implied. *Rex* v. *Wincanton* (*c*). Then the hiring being in the first instance general, it rested upon the other side to limit the effect of that general hiring. This is like the case of *Rex* v. *Berwick St. John* (*d*), where the pauper was desired to go into *Ned Hill's* place, and the Court held that to refer to the period for which *Hill* was hired, not to the kind of work he had to do. The expression, "you may go when you like," must necessarily be referred to the dispute on the occasion on which they were spoken. What passed then might or might not have amounted to a dissolution of the service by mutual consent at that time, but it would not in either case destroy the effect of the general hiring, which took place when the pauper entered the service. *Rex* v. *Stockbridge* (*e*), and *Rex* v. *Seaton* and *Beere* (*f*), are in point. The cases of *Rex* v. *Christ's Parish* in *York* (*g*), and the *Rex* v. *Great Bowden* (*h*), may be relied on by the other side; but the circumstances in them were different from those of the present case. There the only question that could have arisen was, whether or not there was a hiring at all: if there was one, it must have been a general hiring, the effect of which is the same as a hiring by a year.

Lord DENMAN, C. J.—I do not wish to interfere with the doctrine that a general hiring is a hiring for a year. The question really is as Mr. *Hildyard* states it, whether under these circumstances there could be no hiring. It is quite possible that there might not have been a hiring. The justices may have known whether an ostler's place is, or is not, likely to be entered upon under a hiring. I think also that there is some evidence to shew that there was not any hiring at all. It appears that a dispute occurred between the pauper and a fellow-servant, upon which the master said, "if you are dissatisfied with your place, you may go when you like." Taking this to apply to the original hiring, and that the pauper acquiesced, it would be evidence to shew that there never was a binding obligation between the parties at all. I think, therefore, it is quite possible that the Sessions may have determined correctly on the facts submitted to our consideration, coupled with the information they may possibly have possessed.

WILLIAMS, J.—The Sessions have found this was not a hiring. The cases referred to by Mr. *Hildyard* are very strong to shew that when no time is mentioned an indefinite hiring is contemplated, which is a hiring for a year. If the Sessions had come to another conclusion in this case, perhaps I should have been quite as well satisfied, but that is not the question; it is, whether or not we can say that on the face of the case there is any reasonable ground upon which they might have come to their conclusion? For the reasons my Lord has given, I think there is.

(*a*) 4 Ad. & Ell. 205.
(*b*) 4 Ad. & Ell. 216.
(*c*) Bur. S. C. 299.
(*d*) Bur. S. C. 502.
(*e*) Bur. S. C. 759.
(*f*) 2 Bott. 297. Cald. 440.
(*g*) 3 B. & C. 459.
(*h*) 7 B. & C. 249.

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this case and spoken to the other judges, and must abide by my original impression. The cases cited of *Doe*, d. *Masters*, v. *Gray*, and *Thrustout*, d. *Jones*, v. *Nixon*, were both cases of ejectment, and Lord *Tenterden* in the former case says, "In *ejectment* we can make the real party to the suit pay the costs," and he cites *Thrustout* v. *Shenton* (*c*). The reason why the Court has exercised this power in ejectments is not fully stated in the reports of the cases, it being merely stated that being an action of ejectment, the Court has the power. The reason however is this: in all ejectments the original defendant is really a mere nominal defendant, and it is necessary some steps should be taken to put on the record a real defendant. That may be either the tenant or the landlord, who has a right to be made a defendant under the statute 11 G. 2, c. 19. But the Court expects and requires that the real person who defends should be put on the record, and if the tenant is put on the record as defendant, the Court is led to believe that he is the real and *bonâ fide* defendant. If the landlord, instead of his own name, suffers the tenant's name to appear as a defendant, he is practising a deception on the Court, and therefore the Court, when they find how the real facts are, and that the landlord really has defended the action, will say, "We will put you in the same situation in which you were bound to have put yourself in the first instance." If that is the reason for the Court granting rules similar to the present in actions of ejectment, it is a reason which does not apply to any other form of action. There is a case of *Berkeley* v. *Dimery*, mentioned in a note to the case of *Thrustout*, d. *Jones*, v. *Nixon*, which was an action of trespass, where a similar application to the present was made. In that case there was a plea of not guilty, and it appeared clearly that the defendants acted under the order of *Hill*; but the Court said, "In ejectment the tenant in possession *must* be sued, and the Court will not permit a person to put a mere pauper into possession merely to evade the costs. Here *Hill* might have been sued as a trespasser either jointly or singly, and if he had been sued singly the now defendants might have been called as witnesses. It is said that the plaintiff did not know that *Hill* was the substantial defendant. Parties should take care before, and when they sue, to ascertain who is the substantial defendant." So far the reasons given by the Court do not apply to the present case, for here it does not appear that the plaintiff knew that he could have sued the Duke of *Newcastle* until after he commenced his action; therefore so far Lord *Tenterden's* reasons do not apply. But he goes on, "If the Court were to grant this rule, the application to subject to costs persons who were not parties to the record would be very frequent." That argument does apply to this case. Mr. *Chilton* distinguished the case of *Berkeley* v. *Dimery*, inasmuch as there it did not appear on the record that *Hill* was the real defendant, but I think that does not make any difference. It cannot be said that because a defendant justifies under a third person that his so doing gives the Court any authority over that third person. That position however was not contended for in this case. If the Court could grant this rule at all, it must be on the particular facts of the case. If a person were sued, and another came to his aid, and really defended the action, the Court would interfere, if at all, on that principle. Now I can find no reported case in which that principle has been acted on. I remember two cases where

(*c*) 10 Barn. & Cress. 110.

the attempt was made, and rules *nisi* granted. In one a rule was granted to shew cause why the party who really defended an action should not pay the costs: the case stood over for a long time, and was never ultimately argued. The other case was a case in the Court of Exchequer against Sir *Charles Morgan*. When the rule came on for argument, the Court disclaimed any authority to grant the rule; but the matter was at length referred to the judge who tried the cause. Those cases, as far as they go, show that the Court has not the power now contended for, and I do not therefore like to grant even a rule *nisi*. Here the Duke of *Newcastle* could not have been substituted on this record as the defendant unless the Court could have done so on motion, and I do not see any way in which he could have been so substituted. Therefore, under the circumstances, as I do not see how the Court could exercise any jurisdiction over a person who is not party on the record, nor could in any way be made party to the record, and as the inconvenience referred to by Lord *Tenterden* would arise from granting this rule, it must in consequence be refused.

Rule refused.

HODGSON *v.* TOWNING.

In making an arrest on a *ca sa*, if the officer improperly breaks open the outer door the Court will discharge the defendant out of custody.

A RULE having been obtained to shew cause why the defendant who had been arrested on a *ca sa* should not be discharged out of custody, on the ground that the officer had broken open the outer door of the defendant's house when he made the caption,—

N. R. Clarke shewed cause.—Supposing the fact is made out on the affidavits that the officer did improperly break open the outer door, yet that is not a ground for discharging the defendant out of custody. This question was raised in the case of *Lee* v. *Gansel* (*a*), but not decided. *Lloyd* v. *Sandilands* (*b*) was a case where the defendant was arrested on mesne process, but this point was not raised. The defendant's remedy is by action of trespass.

Whitehurst, contrà.—The common practice is to discharge a defendant out of custody when the officer of the Court has acted improperly in making the arrest.

PATTESON, J.—My doubt is whether the Court has power to discharge this defendant. That power was doubted in *Lee* v. *Gansel*, and an older case was then cited, where it was held that the taking of goods on a *fieri facias* was lawful, although the outer door was broken open to effect the seizure. However, if that is good law, it does not follow that the Court will not discharge this defendant out of custody, as this is a question which affects the liberty of the subject. The inclination of my mind is to think that this remedy may be adopted, but I shall take time to consider the subject.

Whitehurst then cited *Yates* v. *Delamayne* (*c*), where the Court set aside

(*a*) Cowp. 1. (*b*) 8 Taunt. 250. (*c*) Bac. Abr. Execution, N.

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an execution levied on the defendant's goods, because the officer had forcibly broke into the house, whereupon—

PATTESON, J.—I think, under the circumstances, the rule must be made absolute.

Rule absolute, with costs.

BOOTH *v.* HOWARD.

1. The plea of payment into Court given in the 17th rule H. T. 4 W. 4, admits all the causes of action stated in the declaration.

2. The particulars of demand are not to be considered as incorporated with the declaration, so that the items claimed by them are not admitted.

THE declaration in this action was *in debitatus assumpsit*, for work and labour in endeavouring to let houses for the defendant. The particulars of demand contained items amounting to 7*l.* 18*s.* in respect of premises called the White Hart Inn, in the borough, and other items, amounting to 8*l.* 9*s.* 6*d.*, in respect of other premises. The defendant pleaded payment of 5*l.* into Court, and that the plaintiff had not sustained damages beyond that amount, according to the form given in the 17th rule as to pleadings, H. T. 4 W. 4. (*a*) There was no plea of *non assumpsit*. The plaintiff replied that he had sustained damages beyond the amount of 5*l.*, on which issue was joined. At the trial of the cause before the Secondary, the defendant's counsel offered evidence to show that the latter items claimed in the particulars of demand, amounting to 8*l.* 9*s.* 6*d.*, were for business done, not for the defendant, but for her mother, and that the houses for which that part of the business was done belonged to her mother. The plaintiff's counsel objected, that by the payment of money into Court, the whole cause of action was admitted, and that therefore the defendant could not contest her liability, but only the unreasonableness of the charges. The Secondary overruled the objection, and the evidence was admitted. The jury then found that the plaintiff had not sustained damages beyond the 5*l.* paid into Court. A rule having been obtained calling on the defendant to show cause why the verdict should not be set aside and a new trial had,—

Addison shewed cause.—If this case had occurred before the late rule of Court, the case of *Seaton* v. *Benedict* (*b*) would have been conclusive. The law on the subject is not now altered, but still it may be perhaps a question how far the rule of H. T. 4 W. 4. does alter it. Had this been an action of debt instead of *assumpsit*, there could have been no doubt that by the form given in the rule the contract stated in the declaration beyond the amount paid into Court would have been denied, and it is not conceivable that the rule was intended to have a different effect in actions of *assumpsit*. The latter part of the plea expressly puts in issue the whole cause of action beyond the amount paid into Court. But even supposing the plea admits the whole cause of action, the declaration being a general *indebitatus* count, it cannot be said that every item of the claim is admitted, unless it can be shown that the particulars of demand are to be considered as incorporated with the declaration. The case of *Meager* v. *Smith* (*c*) is an authority against such a

(*a*) 2 Dowl. P. C. 320. (*b*) 5 Bing. 28. 2 Moore & P. 66.
(*c*) 4 Barn. & Adol. 673.

position. *Jones* v. *Read* (*d*) also shows that the evidence given in this case was admissible.

James, *contrà*.—Had the action been in debt, the form given in the rule would not have had the effect contended for, as the form is that the defendant *is* not indebted to a greater amount, whereas the form given in actions of debt for denying the whole cause of action is that the defendant *never* was indebted (*e*). The count here, though a general count in *indebitatus assumpsit*, may yet be considered as a special count, as it states a certain sum is due for work and labour in letting houses. By the payment into Court the whole contract for letting houses is admitted, and as the items claimed all relate to such a contract, the business done on every item therefore is admitted to have been contracted for. It only remains for the defendant to dispute the reasonableness of the charges. The cases of *Ravenscroft* v. *Wise* (*f*) and *Lechmere* v. *Fletcher* (*g*) support this view of the case. The judgment of Lord *Abinger* in the case of *Jourdain* v. *Johnson* (*h*) is also in some degree to the same effect. Since the case of *Coates* v. *Stevens* (*i*) the practice has been to plead the plea of *non assumpsit* together with the plea of payment into Court, where the defendant has intended to dispute the causes of action beyond the amount paid into Court.

PATTESON, J.—I think the question turns entirely on the point whether the particulars of demand are to be considered as incorporated with the declaration, and I shall take time to consider the case.

Cur. adv. vult.

PATTESON, J.—Afterwards (January 31st) gave judgment. This was an action of *indebitatus assumpsit* for work and labour in endeavouring to let certain premises of the defendant. The particulars of demand contained charges amounting to 7*l.* 18*s.* in respect of premises called the White Hart Inn, in the borough, also other charges, amounting to 8*l.* 9*s.* 6*d.*, respecting other premises in Cannon-street and King William-street. The defendant pleaded payment into Court of 5*l.*, and that plaintiff had sustained no damages beyond that sum in respect of the causes of action mentioned in the declaration. At the trial the plaintiff established a demand in respect of the premises in the borough, and the jury thought the 5*l.* paid into Court sufficient to satisfy such demand. The plaintiff also made out a *primâ facie* case as to the other premises. The defendant contended that she was at liberty to shew as to those other premises that they belonged to another person, by whom the plaintiff was employed, and that she was not liable in respect of them. The plaintiff contended that the defendant by her plea admitted her liability as to every item in the particulars, and put herself entirely on the question how much was due on each item. The case has been argued here upon the analogy of the old practice of payment into Court under a rule, but it appears to me that such analogy will not hold, because, according to that

(*d*) 1 Nev. & Per. 19.
(*e*) Reg. H. T. 4 W. 4. 2 Dowl. P. C. 324.
(*f*) 1 Cromp. M. & Ros. 203. 2 Dowl. P.C. 676.
(*g*) 1 Cromp. & Mees. 623.
(*h*) 1 Gale. 312. 4 Dowl. P.C. 534. 5 Tyr 524.
(*i*) 1 Gale. 75. 3 Dowl. P.C. 784.

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practice, there was always a plea of the general issue, which directly put in issue the liability of the defendant *ultrà* the money paid into Court. It has also been argued upon the language of the plea of payment into Court, both in *indebitatus assumpsit* and in debt, showing, as it is urged, that the plea puts in issue the amount of the demand only, admitting the liability of the defendant in all respects. I am of opinion that this is so, and that all the causes of action stated in the declaration are admitted by this plea. Still the question remains, what are the causes of action stated in the declaration? Now the declaration, being quite general in its form, may embrace many causes of action, or may be confined to one; and the plea having reference to so general a form, cannot be fairly taken to admit more than that the defendant is indebted, on some cause of action coming within the description in the declaration, to the extent of the money paid into Court. Even upon a judgment by default nothing more would be admitted. But if the particulars of demand be considered as incorporated in the declaration, all the contracts stated in those particulars will undoubtedly be admitted by the plea; and if the liability of the defendant on any of them be intended to be disputed, some other plea must be resorted to. Both the sense and language of this plea would in such case confine the question in dispute to the amount only which the plaintiff is entitled to recover upon admitted contracts.

I have had considerable doubt upon the point, but have at length arrived at the conclusion, that particulars of demand are not to be considered as incorporated in the declaration. They are intended for the benefit and information of the defendant, and although the defendant might in this case have pleaded as to 8*l.* 9*s.* the general issue, as to the residue of the demand, payment of 5*l.* into Court, and would, I think, have taken a better course if she had so pleaded, yet I am not prepared to say that she was bound to do so. So far as the pleadings are concerned, I think that she was not obliged to look out of the record, and as the declaration is in its language general, she was at liberty to treat it as embracing only that contract which she chose to admit, though she could not thereby preclude the plaintiff from establishing any other contracts, of the existence of which, on the whole of the evidence, the jury might be satisfied, and which would range themselves under the general words of th declaration. I have not been able to find any direct authority on the point, but the judgment of *Littledale*, J. in *Meager* v. *Smith* is strong to show that the particulars are not of necessity to be taken as part of the declaration, and the practice in cases of judgment by default points the same way.

I should add, that even if the plea did admit that something was due on each item in the particulars, still, as the plaintiff must make out by evidence how much was due, and the defendant might adduce evidence in answer, the jury might be satisfied by such evidence and give only nominal damages; but if they were bound to give even 1*s.*, the verdict would have been for the plaintiff, and it is therefore necessary to determine the principal question. Upon the whole, I am of opinion that the evidence on the part of the defendant was properly admitted, and that the present rule for a new trial must be discharged.

Rule discharged.

MORTON *v.* BURN and Another.

Speedy execution having been awarded under the stat. 1 W. 4, c. 7, and the money paid over, after which the defendant obtained a rule *nisi* to arrest the judgment:—*Held*, that the Court had no power to make the plaintiff pay the money into Court until the decision of the rule for arresting the judgment.

THIS cause was tried at the sittings after last term, and a verdict was found for the plaintiff and speedy execution was awarded under the stat. 1 W. 4, c. 7. The defendant immediately paid the debt and costs before execution issued. This term a rule *nisi* had been obtained to arrest the judgment. A rule having been obtained to show cause why the plaintiff should not pay the debt and costs into Court to abide the decision of the Court on the rule for arresting the judgment,—

W. H. Watson shewed cause in the first instance.—This application is made under the authority given to the Court by the stat. 1 W. 4, c. 7, s. 4. That enactment, however, does not give the Court this power. In the present case the money has been already paid over, and therefore the execution cannot be stayed, nor can the Court *restore* the money to the defendant, as it does not yet appear that he is entitled to have it. All the cases where any similar application has been granted have been where it has been as a condition for some indulgence prayed for.

Edwards, contrà.—This power is clearly given to the Court by the 1 W. 4, c. 7, s. 4. The latter words of that section, "or otherwise, as the Court may think fit to direct," are put in the disjunctive, and if this rule is not granted the intention of the act will be defeated.

Cur. adv. vult.

PATTESON, J., afterwards (January 27) gave judgment.—I think, after much consideration of this subject, I have no power to grant such a rule as that now prayed for under the words of the act 1 W. 4, c. 7, s. 4. That act only enacts that the Court may order "execution to be stayed or set aside, &c. as justice may appear to require, and thereupon the party affected by such writ of execution shall be *restored* to all that he may have lost thereby, in such manner as upon the reversal of a judgment by writ of error or otherwise, as the Court may think fit to direct:" that is, he may be otherwise *restored* as the Court may direct. But here the defendant could not be restored, as it does not yet appear he is entitled to have the money that he has paid. I have been anxious to see if I could grant the rule by the general practice of the Court, independent of that act. Now the practice has been that a writ of error should act as a *supersedeas* of execution, and if it issues after execution issues, but before a levy is made, the practice of the Court has also been to stay the execution. But I find, if the execution has been executed and the money has been paid over, the Court will not interfere, but will leave the party to his remedy by writ of restitution. I doubt, therefore, the Court has not this power, and because it would be quoted as a precedent if I were to grant this rule, and because I do not see why it would not equally apply to all cases, I must, in consequence, refuse this rule.

Rule refused.

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FOSTER, *qui tam*, *v.* ROUNDAL, Sheriff of Yorkshire.

The Court refused to make a plaintiff in a *qui tam* action for extortion who was a mere pauper, and where the action appeared vexatious, to find security for costs.

AN action had been brought by *Duncombe*, in which he recovered judgment, and a *fieri facias* issued, which was delivered by *Yeats*, *Duncombe's* attorney, to the sheriff's officer, *Laming*, to execute. *Laming* accounted with *Yeats* for what he had levied, when the latter objected to the poundage being too high; *Laming* then struck off what was objected to. The present plaintiff was a clerk in *Yeats'* office, and commenced this *qui tam* action against the sheriff for extortion in the above-mentioned transaction. An action was also commenced in the name of *Duncombe* as the party aggrieved, and also a third action for extortion in the same transaction.

W. H. Watson having obtained a rule *nisi* to stay the proceedings in the action commenced in the name of *Duncombe*, because it was instituted by *Yeats* without *Duncombe's* authority, next moved to stay the proceedings in this cause until security was given for the costs. He submitted that it was a clear case of vexation, that there was no ground for the charge of extortion, that the actions were merely the actions of the attorney *Yeats*, that the nominal plaintiff was a mere pauper, and that under those circumstances the Court would grant the rule.

PATTESON, J.—I never heard of security for costs being given merely on the ground that the plaintiff was a pauper. There was a case moved in this Court before me where security for costs was demanded in a *qui tam* action, on the ground of the defendant being a pauper. I spoke to the other judges, and we thought it could not be compelled, and the rule was refused.

Rule refused. (*a*)

(*a*) Gregory, *q. t. v.* Elvidge, 2 Dowl. P. C. 259, and Field, *q. t. v.* Carron, 2 H. Black. 27, are to the same effect.

DOWNING *v.* JENNINGS and Another.

A rule for judgment, as in case of nonsuit, in an action where there were two defendants, was drawn up as if there was only one defendant: *Held*, an error which ought to be amended.

THIS was a rule for judgment as in case of *nonsuit*, and in drawing up the rule the officer of the Court had omitted to add the letter 's' to the word 'defendant' in the printed form of the rule, so that the rule stood in the form "why judgment should not be given for the *defendant*, as in case of *nonsuit*," &c.

Archbold, on shewing cause, objected that, there being two defendants, the rule was bad, as a rule for judgment as in case of *nonsuit*, could not be had for one only of several defendants. He offered to waive the objection, and give a peremptory undertaking for the sittings after Easter Term.

Hon. *J. C. Talbot* contended he was entitled to a peremptory undertaking

o try the cause at the sittings after the present term, and that the omission of he letter 's' was immaterial, as it could not have misled the plaintiff.

PATTESON, J.—I think it would be better that the defendants should accept the offer made, as in strictness I think application should be made to amend the rule. That may be done, as the mistake was the act of the officer of the Court.

Hon. J. C. Talbot then elected to have a new rule.

Ex parte MORRIS.

A charge was preferred before a grand jury for obtaining a bond under false pretences, and the bill was ignored. After this the attorney for the prosecution obtained the bond from the constable, who had it to produce before the grand jury on giving him an indemnity. The Court refused to make a rule absolute which called on the attorney to deliver it up to the obligee.

THE applicant, *Mathias Morris*, had been taken before a magistrate on a charge of obtaining a bond from an elderly lady, *Hester Morris*, under false pretences. The magistrate took possession of the bond, and bound the parties over to prosecute. A bill was accordingly preferred before the grand jury, but was ignored. The magistrate gave the bond to the constable to produce before the grand jury, and after the bill was ignored *M. Morris* applied to the constable for it. He refused to give it up until he had spoken to the attorney for the prosecutor *Hester Morris*. On being again applied to, the constable said he had given it up to the attorney on an indemnity being given to him. The attorney then handed it over to his client, *Hester Morris*. A rule having been granted by *Littledale*, J., in Michaelmas Term, calling on the attorney to shew cause why he should not deliver up the bond to *M. Morris* or his attorney,—

Chilton now shewed cause.—This is an attempt to extend the summary jurisdiction of the Court over an attorney beyond anything that has yet been done. The Court in the case of *Aitkin* (*a*) exercised a greater power than had ever before been exercised, but the present case does not come within the principle of that decision. In that case the application was by a party who had employed the attorney in his character of attorney, and the Court granted the application. But in the case of *Fenton* (*b*) the Court expressly refused to exercise any summary jurisdiction over an attorney when the application was made by a third party, and not by the client. The present case is an application by a third party, who never employed the attorney. The judgment of *Littledale*, J., in *ex parte Smarte* (*c*) is also very strong to shew that the Court will not exercise the power now asked for at the instance of a person who is not the client of the attorney.

J. Evans, contrà.—The rule laid down on the other side, that the Court will only exercise the power now asked for, in cases where there has been the relation of attorney and client between the parties, is too limited. The Court will also exercise its power to prevent misconduct on the part of attorneys, without reference to the relation of client and attorney having subsisted.

(*a*) 4 Barn. & Ald. 47.
(*b*) 1 Har. & Wol. 310. 3 Adol. & El. 404. 5 Nev. & Man. 239.
(*c*) 1 Har. & Wol. 526.

Bail Court.
Ex parte Morris.

The cases cited on the other side are a class of cases independent of the present application. In this case it is quite clear the attorney was acting in his character of an attorney, and the Court will not countenance conduct like the present, where an attorney has got possession, by means of giving an indemnity, of an instrument which may be adverse to his client's interests.

Patteson, J.—I should like to speak to my brother *Littledale*, who granted this rule, although my present impression is against the application. There is no doubt but that the Court has the jurisdiction over attorneys now contended for, but then it is in another shape. One class of cases is, where the relation of attorney and client has subsisted, in which class the case of *ex parte Aitkin* occurred. The other class of cases is where a sort of criminal application is made to the Court to compel an attorney to answer the matters of an affidavit. It is in that class that the Court exercises the jurisdiction now contended for.

Cur. adv. vult.

Patteson, J., on a subsequent day (January 27) said,—I have seen my brother *Littledale*, and he thinks the rule cannot be sustained. It must therefore be discharged.

Rule discharged.

The King *v.* Lewis and Others.

Certiorari granted to remove a presentment from before the Commissioners of Sewers in a case where the chairman confessed he was ignorant of the law applicable to the case.

This was an application to remove two presentments before the Commissioners of Sewers for the county of Monmouth for non-repair of a sea wall by the defendants, *ratione tenuræ*. The defence was, that the wall was in good repair, but had been washed away by an extraordinary high tide, caused by a hurricane. The chairman of the Commissioners, when charging the grand jury, was asked to state to them what was the law on the subject, when he said he was unable to do so.

The *Attorney-General* moved for the *certiorari* on the ground of the ignorance of the chairman as to the law applicable to the case; and also because it was expected difficult points of law would arise at the trial; and because it was desirable to have a special jury.

Maule shewed cause, and contended that it was not necessary the chairman should have stated the law to the grand jury on charging them; and that on the defence made, only two simple matters of fact would arise at the trial, namely, whether the sea wall was in good repair previously, and whether it was an extraordinary tide that destroyed it.

The *Attorney-General*, *contrà*, was stopped by the Court.

Patteson, J.—It appears that the gentleman who was chairman of the Commissioners at the time of the grand jury being charged, confessed him-

self ignorant of the law applicable to the case. The same gentleman may preside when it comes on for trial, and he is clearly utterly incompetent to try the case. I do not think that it is unnecessary to say any thing to the grand jury as to the law of a case of which they are to have the finding, as in that way a presentment might be found directly against the law. Therefore on this part of the case alone, namely, the acknowledged want of acquaintance with the law on the subject, this rule must be made absolute.

Rule absolute.

REED *v.* SPIERS.

The Court will issue an attachment, although the party cannot be arrested on it, being at the time under examination under a fiat in bankruptcy.

THIS was a rule calling on the plaintiff's attorney to shew cause why an attachment should not issue against him for non-payment of money, pursuant to a rule of Court, and the Master's *allocatur* thereon. It appeared that a *fiat* had been issued against the attorney, and that he had surrendered, and had received the protection of the Commissioner under the stat. 6 G. 4, c. 16, s. 117. The forty-two days' extent of that protection had not expired.

Ball shewed cause against the attachment, and contended, that as it was clear from the cases of *ex parte Parker* (*a*) and *ex parte Jeyes* (*b*) that the attorney could not be arrested on the attachment, the Court would not, under such circumstances, issue the attachment at all.

Arnold, *contrà*, contended that, in the event of the attorney not obtaining his certificate under the *fiat*, the party on whose account the attachment was moved for would have a priority. It was therefore necessary for the party that this attachment should issue, though he could not at present arrest the attorney on it. If he was arrested he might be discharged. When a person is improperly arrested on a *capias*, he may, on application to the Court, be discharged; but that improper arrest is no ground of objection to the *capias*, and in the case of *Lewis* v. *Morland* (*c*) it was held that an attachment for non-payment of money was in the nature of *mesne* process. Therefore it is no objection to the issuing of this attachment that the attorney cannot be arrested on it.

PATTESON, J.—I think the party is entitled to have this attachment issued, but he will execute it at his own peril.

Rule absolute.

(*a*) 3 Ves. jun. 554.
(*b*) 3 Deac. & Chit. 764.
(*c*) 2 Barn. & Ald. 56.

Bail Court.

HUNT *v.* HUNT.

1. If there are several issues in an action which is referred to an arbitrator, it is sufficient that the arbitrator by his award shows how he means the decision on each issue to be made, without specifically awarding on each.

2. Three actions of assumpsit were referred, in which there were issues on pleas of non-assumpsit, set off and non-joinder; an award merely stating how much was due to the plaintiff in each, without awarding on the issues, is bad.

3. If a cause is referred to an arbitrator, the costs of which are to abide the event, he cannot award a *stet processus* in the action.

THREE actions were referred to arbitration by order of *nisi prius*, a verdict being taken in one of them, and it was directed that the costs of the respective causes should abide the event and determination of the award upon each respectively. The first action in which the verdict was taken was by *Jemima Hunt* against *Thomas Hunt*, and the declaration contained a count on a promissory note, a count for goods sold, and the money counts. The defendant pleaded, 1st, *non assumpsit* as to all the declaration, except the first count and the sum of 51*l.* 13*s.* 9½*d.*, part of the other counts; 2nd, a set-off as to the whole, except the sum of 51*l.* 13*s.* 9½*d.*; 3rd, as to the 51*l.* 13*s.* 9½*d.*, that the promises were made jointly with *Batcheldor Hunt*. On these pleas issues were joined. The second action was by *Martha Hunt* against the same *Thomas Hunt*, and the declaration had a count on a promissory note, a count for goods sold, and the money counts. To these the defendant pleaded, 1st, *non assumpsit* to all, except the first count; and 2nd, a set-off to the whole declaration, on which pleas issues were joined. The third action was by both *Jemima* and *Martha Hunt* against *Thomas* and *Batcheldor Hunt*, and the declaration contained the money counts. *Thomas Hunt* pleaded *non assumpsit*, and *Batcheldor Hunt* suffered judgment by default. The arbitrator by his award ordered that each action should cease and be no further prosecuted, and also found that in the first action 84*l.* 15*s.* 6*d.* was due and owing from *Thomas Hunt* to *Jemima Hunt*; in the second, that 229*l.* 13*s.* 6*d.* was due and owing from *Thomas Hunt* to *Martha Hunt*; and in the third, which he described as the joint action of *Jemima* and *Martha Hunt* against *Thomas Hunt*, that there was due and owing 16*l.* 19*s.* 10*d.* from *Thomas Hunt* to *Jemima* and *Martha Hunt*. The arbitrator also awarded that each of those sums should be paid by the parties from whom they were stated to be due. A rule was obtained on the part of *Thomas Hunt* to shew cause why this award should not be set aside, for the following reasons amongst others: that the arbitrator had not adjudicated on each specific issue, especially on the issue on the plea in abatement; and that the award was ambiguous and uncertain in directing the actions to be discontinued.

Martin shewed cause.—To the objection that the arbitrator has not adjudicated on each issue, it is submitted that it is not necessary he should do so, if he has in fact substantially decided the questions in dispute. That rule is laid down in the cases of *Wykes* v. *Shipton* (*a*) and *Jackson* v. *Yates* (*b*). In this case the arbitrator has substantially decided all the questions in dispute, having awarded in each case what is due to the several plaintiffs. If it is objected that the arbitrator should have decided specifically on each issue with reference to the costs, the case of *Dibben* v. *the Marquis of Anglesea* (*c*) shews that the arbitrator should have been particularly requested to decide each issue for that purpose, and it does not appear on the affidavits that that was done. Against the other objection, that the award is ambiguous in direct-

(*a*) 3 Nev. & Man. 240.
(*b*) 5 Barn. & Ald. 848.
(*c*) 2 Cromp. & Mees. 722. 10 Bing. 568.

ng the actions to be discontinued, the cases of *Blanchard* v. *Lilly* (*d*) and *Pearse* v. *Pearse* (*e*) are conclusive authorities.

Smirke, *contrà*.—The first objection in this case must prevail, because the arbitrator has not substantially decided the questions in dispute. How can it be known by the award of a certain sum being due to the plaintiff in the first action whether the defendant is entitled to a verdict on the pleas of non-joinder and of set-off? Then again as to the joint action against *Thomas* and *Batcheldor Hunt*, the arbitrator has awarded that a certain sum is due by *Thomas Hunt*, and takes no notice of *Batcheldor*. How can it be known whether this is due from *Thomas* alone, or from *Thomas* and *Batcheldor* jointly? if it is due from the former alone, then the plaintiff was not entitled to a verdict in that action. The case of *Dibben* v. *The Marquis of Anglesea* is not an authority for the other side, as in that case the arbitrator awarded distinctly as to the rights of each party to the reference. *Gyde* v. *Boucher* (*f*) is also an authority against this award being good. As to the other objection, the cases of *Norris* v. *Daniel* (*g*), and *In re Leeming* (*h*), shew, that where the costs of the cause are to abide the event, if the arbitrator awards that the action should be no further prosecuted, the award will be bad, as there is no certain event by which the costs can be taxed.

Cur. adv. vult.

PATTESON, J., afterwards (Jan. 31) gave judgment. In this case several objections were taken to the award, but as my judgment turns on one only, I do not think it necessary to notice the others.

Three causes were referred by order of *nisi prius*, a verdict being taken in one, and it was directed that *the costs of the respective causes should abide the event and determination of the said award upon each respectively.* In the first action *Jemima Hunt* was plaintiff, and *Thomas Hunt* defendant; the declaration was on a promissory note and money counts. The defendant pleaded as to all but the first count, and 51*l.* 13*s.* 9½*d.*, part of the other counts, *non assumpsit;* second, as to all but 51*l.* 13*s.* 9½*d.* a set-off; third, as to 51*l.* 13*s.* 9½*d.* the non-joinder of *Batcheldor Hunt* as a defendant, issues were taken. In the second action *Martha Hunt* was plaintiff, and *Thomas Hunt* defendant; the declaration was on a promissory note, and the money counts. Pleas, set-off, and *non assumpsit* to the latter counts, and issues taken. In the third action, *Jemima* and *Martha Hunt* were plaintiffs, and *Thomas* and *Batcheldor Hunt* defendants. The declaration was on the money counts. *Thomas Hunt* pleaded the general issue, and *Batcheldor Hunt* suffered judgment by default. The arbitrator has awarded in each case that the action shall cease and be no further prosecuted, and has found in the first 34*l.* 15*s.* 6*d.* to be due to *Jemima Hunt*. In the second, 229*l.* 13*s.* 6*d.* to be due to *Martha Hunt*. In the third, which he describes as an action by *Jemima* and *Martha Hunt*, against *Thomas Hunt*, 16*l.* 19*s.* 10*d.* to be due from *Thomas Hunt* to *Jemima* and *Martha*, saying nothing about *Batcheldor Hunt*, though he directly afterwards awards that the action by *Jemima* and

(*d*) 9 East, 497.
(*e*) 9 Barn. & Cress. 484.
(*f*) 2 Har. & Wol. 127. 5 Dowl. P. C. 127.
(*g*) 10 Bing. 507.
(*h*) 5 Barn. & Adol. 403.

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Martha against *Thomas* and *Batcheldor Hunt* shall cease, and be no further prosecuted. The objection taken is, that the arbitrator has not adjudicated on each specific issue, and that he was bound to do so, because the costs are to abide the event. Again, that he has awarded a *stet processus* in each action, which is in effect exercising a discretion as to the costs, because it prevents either party from having them, there being no legal event of the award, whereas they were to abide the legal event. It was answered that the arbitrator need not in terms adjudicate on each issue; that it is sufficient if he so express himself that it is plain how he means the verdict or decision to be. I agree to that answer, which is certainly the rule as laid down in several cases, and have endeavoured to find, from the language of this award, whether it was the intention of the arbitrator that a verdict should be entered for the plaintiff in each case, to the amount of the sum he has found to be due. I am not however fully satisfied that such was his intention, nor can I tell how he meant that his award of a *stet processus* should operate; whether to prevent any verdicts being entered, or any judgments on such verdicts. In either way the award of a *stet processus* is beyond his authority, because it either prevents any legal event of his award as to the actions, or prevents the legal events, if the verdicts can be so called, from having their legal operation. An arbitrator cannot in any case award a *stet processus*, except when he has power over the costs. *In re Leeming*, *Norris* v. *Daniels*, *Dibben* v. *Marquis of Anglesea*, which last case was really decided on the grounds of issues becoming immaterial, which was not the case here. But I thought at one time that this award of a *stet processus* prejudiced the plaintiffs only, and that they might waive the prejudice; however, on looking fully to the pleadings, I find that not to be so. The defendant *Thomas Hunt* was entitled to have his costs if his set-off was proved, or if his plea in abatement was proved; and still more, in the joint action against him and *Batcheldor Hunt*, if the money found to be due in it was due from him, *Thomas*, only, he was entitled to a verdict for the misjoinder of *Batcheldor*, and to all the costs of that action. Now the arbitrator has omitted *Batcheldor's* name, in finding the sum due to *Jemima* and *Martha* jointly, and it is impossible for me to supply the name, or to tell at all what the legal event as to that action is. It may be, therefore, that the defendant is really prejudiced by this award; at any rate it is so uncertain whether if the arbitrator had specifically adjudicated on each issue, he would not have found some one or more for the defendant, that I cannot say that the prejudice is all on the plaintiff's side, and may be waived. On these grounds, viz. that the arbitrator has not either specifically or by necessary implication adjudicated on each issue, and that he has exceeded his authority in awarding a *stet processus* in each case, having no power over the costs; I feel myself compelled to say that this award is bad, and that the rule for setting it aside must be made absolute.

Rule absolute.

GRIPPER *v.* Lord TEMPLEMORE.

Judgment as in case of nonsuit cannot be moved for in the same term that default has been made, although issue was joined two terms previously.

THIS was a town cause, and issue was joined in Trinity Term last. In Michaelmas Term notice of trial was given for the second sittings in the present Term, previous to which notice of countermand was given.

F. Robinson moved for judgment as in case of nonsuit.—The question is, whether this rule can be moved for in this term, it being the same in which the plaintiff has made default? In *Isaac* v. *Goodman* (*a*), it was decided it could not be moved for in the same term in which issue was joined, and default made; and in *Preedy* v. *Macfarlane* (*b*), that it could not be moved for in the same term in which default was made, issue having been joined in the previous term. The present case differed from those, as issue was joined two terms back. If the present rule is not granted, it enables a plaintiff by a mere trick of giving a notice of trial, and then countermanding it, to compel a defendant to wait until a fourth term before he can obtain judgment, as in case of nonsuit.

PATTESON, J.—The decision in the last of the cases cited is on the ground that the default was in the same term, not on the ground that issue was joined one term only previously. That decision is an authority against this application.

Rule refused.

(*a*) 2 Dowl. P. C. 34. (*b*) 2 Dowl. P. C. 216.

ROGERSON *v.* HARE.

The plaintiff, who was holder of a bill of exchange, told his attorney to give notice of the dishonour in the name of a previous indorser: this was done, but without the authority of that indorser:—*Held*, that this was a good notice.

THIS was an action on a bill of exchange by an indorsee against an indorser. The plaintiff, who was holder of the bill when it was dishonoured by the acceptor, told his attorney *Willoughby* to give notice to the defendant of the dishonour, in the name of *Baines*, who had indorsed the bill to the plaintiff. *Willoughby* accordingly wrote to the defendant, "I am instructed by Mr. *Baines* to give you notice &c.," and signed the letter with his own name. It was objected, at the trial before the under-sheriff, that this was not a good notice. This objection was overruled, and a verdict was found for the plaintiff, with leave for the defendant to move the Court on the point. The jury also found that *Willoughby* had no authority from *Baines* to give the notice. A rule having been obtained to shew cause why the verdict should not be set aside and a nonsuit entered,—

Knowles shewed cause.—This notice would have been a good notice if *Willoughby* had not stated by whom he was instructed, and the addition of that statement does not vitiate it. The case of *Chapman* v. *Keane* (*a*)

(*a*) 1 Har. & Wol. 165. 3 Adol. & El. 193.

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decides that a notice of dishonour by any party to a bill enures for the benefit of all, and therefore, whether this is to be considered as a notice by *Baines*, or by the plaintiff, it is a good notice.

Mansell, contrà.—This notice was given by a person calling himself the agent of *Baines*. It appears that *Baines* had given him no authority whatever to give that notice, and consequently it becomes the mere act of *Willoughby* himself. Now he is a stranger to the bill, and therefore the notice is not sufficient. It is immaterial whether or not the plaintiff instructed *Willoughby* to give the notice.

PATTESON, J.—The whole of this question is, whether *Willoughby* in giving a notice in the name of a person from whom he had no authority, and therefore, it not being a notice by that person, is to be considered as a mere stranger. Now here the person from whom he had authority was the actual holder of the bill; it is true *Willoughby* represented himself as the agent of a person who had not authorized him; but I think the case is within the principle of the case of *Chapman* v. *Keane*, and I shall not disturb the verdict.

Rule discharged.

DOE, dem. JOHNS & Others, *v*, ROE.

A person who was working mines under a license to do so, which gave him no interest in the land, on being served with a declaration in ejectment, applied to the Court to stay the proceedings, but was refused.

THE premises sought to be recovered in this ejectment were some mines, and the person who had been served with the declaration was working them under a license called a set, from one of the lessors of the plaintiff. This license did not prevent the party who gave it from working the mine also himself.

Peacock, on the part of the person who had been served, moved for a rule to stay the proceedings in the action. He submitted, that the party served was in this dilemma, that if he defended the ejectment he was sure to be defeated, as the Court had decided in the case of *Doe*, d. *Hanley*, v. *Wood* (*a*), that under such a license he could not maintain ejectment; and if he suffered judgment to be obtained against the casual ejector, then the sheriff in delivering up possession would have a right to remove him and all his machinery and goods off the premises. Having the right of possession, but at the same time no interest in the land, placed him in this difficult position.

PATTESON, J.—It seems to me impossible that I should grant this rule. It is admitted that the party has no defence to the action, but at the same time he seeks to get rid of the action by a side wind.

Rule refused.

(*a*) 2 Barn. & Ald. 724.

THOMAS *v.* LEWIS (Clerk).

A juror was withdrawn for the purpose of referring a cause to arbitration; the arbitrator being unable to decide on the conflicting evidence, made no award, and the cause was taken down a second time for trial:—*Held*, that the party ultimately prevailing was not entitled to the costs of the first trial.

[HIS cause when it came on for trial was partly gone into, when a juror was withdrawn, and the cause was referred by order of *nisi prius* to arbiation. The costs of the cause were to abide the event, and the arbitrators as empowered to set out the bounds of certain land. The arbitrators, after xamining the witnesses, differed as to making the award, whereupon it was eferred to the umpire, who said he was unable to make any award on account f the conflicting evidence, and the time for making the award was accordngly allowed to expire. The plaintiff then took the cause down a second me for trial, and he obtained a verdict. In taxing the costs, the Master disllowed all the costs of the first trial. A rule having been obtained calling n the defendant to shew cause why the Master should not review his axation,—

Chilton shewed cause.—This case comes within the general rule, that where juror is withdrawn, each party pays his own costs. The case of *Payne* v. *ailey* (*a*), where the costs of a former trial were allowed, may be distinuished from the present, as there it was owing to the perverseness of the efendant that the cause was taken down a second time for trial. The same bservation may be applied to *Poole* v. *Selwood* (*b*). The case of *Burchall* . *Ballamy* (*c*) will also be relied on, where this Court said, that for the ture, in all cases where a trial goes off without the fault of the parties, and e cause is a second time tried, that the costs of the first trial should be llowed to the party ultimately prevailing. That rule however has not been cted on since, as will be seen on reference to the case of *Smith* v. *Haile* (*d*). he point has since been finally determined in the case of *Seally* v. *Powis* (*e*). t is true that that case may be distinguished from the present, but the judgent of *Patteson*, J., is conclusive as to this case also. *Edwards* v. *Brown* (*f*) ay also be cited against the present rule. It is clear there has been no fault n the part of the present defendant, and therefore the costs of the first trial ill not be allowed.

V. Williams, contrà.—This case stands in some respect by itself, on its own eculiar circumstances, and as it is clear that the plaintiff, who was ultimately uccessful, was right in bringing his action, the Court will grant this rule, nless there is any authority against it. The rule as laid down to be followed for the future in the case of *Burchall* v. *Bellamy* is expressly in favour of this application, and it is immaterial whether that rule has since been departed from. It will however be observed, that that rule has in fact not been departed from, if the case of Lord *Mountcharles* v. *York* (*g*) is referred to. The principle on which each party pays his own costs, in cases where a juror is withdrawn, is, that the parties consent to consider the case as a drawn battle. That principle does not apply to the present case, where the juror was with-

(*a*) 3 Brod. & Bing. 304. 7 Moore, 147.
(*b*) 1 Price, 310.
(*c*) 5 Burr, 2693.
(*d*) 6 Term Rep. 71.
(*e*) 1 Har. & Woll. 118. 3 Dowl. P. C. 372. S. P. *Waite* v. *Spurgin*, 4 Dowl. P. C. 575.
(*f*) 1 Dowl. P. C. 282. 1 Cromp. & Jer. 354. 1 Tyr. 281.
(*g*) 1 Lord Ken. 341.

Bail Court.

THOMAS v. LEWIS.

drawn for the purpose of referring the case to arbitration As the costs were directed to abide the event, it is clear that the parties did not intend to consider it a drawn battle. The cases of *Poole* v. *Selwood*, and *Payne* v. *Bailey*, are nearly similar cases to the present, and there the costs of a former trial were allowed to the party ultimately successful. The cases of *Sparrow* v. *Turner* (*h*), and *Harrison* v. *Bennett* (*i*), where a previous trial went off for want of jurors, are also authorities in favour of this application. *Seally* v. *Powis* is entirely distinguishable: that was a case where the first trial went off by the act of the judge, who took on himself to decide that the cause should be a drawn battle.

COLERIDGE, J.—It does not appear that there is any case directly in point, and I must therefore decide this case on principle, and it seems to me that the principle is more correctly stated in the case of *Seally* v. *Powis*, and that this rule must therefore be discharged, but not with costs. At the time when the juror was withdrawn, the parties did not contemplate having again to come before a jury. Now on the arbitrators being unable to make any award, if the cause had stopped there, it would have been the simple case of a juror having been withdrawn, and each party would have paid his own costs; it would then have been an ordinary case. However, the plaintiff instead chooses again to go down to trial, and I cannot see why he is to say that he is therefore entitled to the costs of the first trial. I do not see, where there was no fault on the part of the defendant at the first trial, why his case is to be altered by what has occurred at the second trial. Both parties have agreed to a mode of settling their dispute which has doubled their expenses, but then it has not been by the default of either, but by mere accident.

Rule discharged, without costs.

(*h*) 3 Will. 366.

(*i*) 1 Dowl. P. C. 627.

DOE, d. GRANT, *v.* ROE.

An affidavit in support of a motion by which a person seeks to be made party to a cause sworn before a Commissioner who is clerk of his own attorney, is good.

THIS was a rule calling on the lessor of the plaintiff to shew cause why the judgment against the casual ejector should not be set aside, and the landlord be admitted to defend the action, on the ground that he had never been served with a copy of the declaration.

Humfrey, on shewing cause, took a preliminary objection to the affidavits on which the rule *nisi* was granted, that the commissioner before whom they were sworn was clerk to the attorney who made the application, contrary to the rule of Court, H. T. 2 W. 4, I. 6 (*a*).

Archbold, *contrà*.—The attorney in this case is not attorney on the record, but is attorney to the landlord, who is seeking by this rule to be made a party. It is not a case therefore within the rule.

COLERIDGE, J.—I think I must hear the affidavits.

(*a*) 1 Dowl. P. C. 184.

DOE, d. SMITH and Others, *v.* ROE.

UDALL moved for a rule *nisi* for judgment against the casual ejector. The affidavit on which he moved merely stated a service of the declaration by sticking it up on the premises, as no one was to be found in possession. The person who in fact had possession was a mortgagor, who was purposely keeping out of the way, and the lessor of the plaintiff was the mortgagee, and brought the action to obtain possession under the mortgage deed. It was contended, that the case was distinguished from those cases where a service by merely sticking up the declaration on the premises was held an insufficient service, as the lessor of the plaintiff not being a landlord, could not proceed under the statute 11 Geo. 2, c. 19, s. 16, nor could he proceed as on a vacant possession, as it was not clear that the premises were legally vacant. The premises being locked up, the lessor of the plaintiff could not get possession without using such violence as would amount to a forcible entry.

In ejectment by a mortgagee, where the mortgagor was purposely keeping out of the way to avoid service, and where it was not clear that the premises were legally vacant:—*Held*, that a service of the declaration by merely sticking it on the premises was sufficient to have a rule *nisi* for judgment against the casual ejector.

PATTESON, J., granted a rule *nisi*, and directed that it should be served by sticking it up on the premises.

Rule *nisi* granted.

The rule was subsequently made absolute, no cause being shewn.

DOE, dem. BUTTRAM, *v.* ROE.

OGLE moved for judgment against the casual ejector. The declaration had been served on the premises on a person who was living with the tenant in possession before the term, but not on the tenant herself. On the 12th of *January*, a letter was received by the post by the attorney for the lessor of the plaintiff, from the attorney of the tenant, dated the 10th of *January*, saying he had received the declaration and notice which had been served on the tenant. The 11th of *January* was the first day of the term.

An acknowledgment by letter received on the second day of term, dated the day before the term of the service of a declaration in ejectment, held sufficient to grant a rule *nisi* for judgment.

PATTESON, J.—You may take a rule *nisi*.

Rule *nisi* granted (*a*).

(*a*) *See* the next case.

DOE, dem. NOTTING, *v.* ROE.

SAUNDERS moved for judgment against the casual ejector. The declaration was served on the 6th of *January*, on the daughter of the tenant on the premises. A letter had been received by the post by the attorney for the lessor of the plaintiff, dated on the first day of the term, from the attorney

An acknowledgment by letter dated on the first day of term, of the service of a declaration in ejectment, held sufficient.

Bail Court.

DOE, d. NOTTIDGE, v. ROE.

to the tenant, saying that the tenant had brought the declaration served on him.

PATTESON, J., granted a rule.

Rule granted (*a*).

(*a*) *See* the previous case.

GRINDALL *v.* GODMAN.

In an action for 115*l.*, before the trial the defendant intimated he should dispute the facts, and also his liability on a point of law, but at the trial the facts were immediately admitted, and the point of law was reserved for the Court above:—*Held*, that the defendant was entitled to the costs of employing two counsel at the trial.

THIS was an action for money expended for the defendant's wife from whom he was separated. There were seven items in the account claimed, amounting to 115*l.*, and before the trial the defendant's counsel intimated he should contest the whole, and also that he should contend that the defendant was not by law liable for any part. The defendant's attorney expected there would be seven witnesses examined for the plaintiff, and there was one witness for the defendant, and he accordingly gave briefs to two counsel. At the last assizes for *Yorkshire*, 1835, when the cause was called on, the defendant's counsel immediately agreed to a verdict for the whole amount claimed, subject to the point of law, whether the defendant was liable under the circumstances. The cause was argued in *Michaelmas* Term last, and the Court determined that the defendant was not liable (*a*). The Master in taxing the defendant's costs refused to allow the expenses of more than one counsel at the trial. A rule having been obtained calling on the plaintiff to shew cause why the Master should not review his taxation,—

Cresswell shewed cause.—It is clear by the agreement between counsel at the trial, immediately the cause was called on, that the defendant had no real defence to the different items, and that he rested the case solely on the point of law. Under such circumstances, one counsel would have been sufficient, and therefore the Master's taxation was right.

Wightman, contrà.—The question turning on a point of law is the very reason why two counsel should be employed. It would depend on the particular circumstances under which each item of amount claimed was paid whether the defendant was liable.

PATTESON, J.—I confess that I am unwilling to interfere with the Master's discretion in a matter that depends on his discretion, but peculiarly so in taxing costs, or in ordering a sum of money to be paid for any particular thing. I think however that I can form some judgment in this case, and I think that the Master should have allowed the expenses of the two counsel. There is a course which is often taken at the assizes, which I am also very unwilling to prevent, I mean when counsel agree together to admit the facts of a case. I therefore think that if the Master is to form his judgment as to the necessity of having two counsel, because the facts of the case are admitted, it would be

(*a*) *See* the case 2 Har. & Wol.

recognising an inconvenient ground of decision. He should look rather at the probability of the facts being contested. Here therefore, although I am unwilling to interfere with his decision, the rule must be absolute.

Rule absolute.

Ex parte FRENCH.

An attorney who had been allowed to be re-admitted, but who had not acted on it for above a year on account of illness, re-admitted without giving the usual notices.

WIGHTMAN moved to re-admit an attorney without the usual notices. On the 31st of *January*, 1835, the Court had made a rule that he should be re-admitted without payment of the arrears of duty or of any fine. That rule had not been immediately acted on, as the attorney broke his leg, and was for some time confined in consequence. Not knowing it was necessary the rule should be acted upon within a year, the attorney had suffered that time to expire without taking out his certificate, which rendered this application necessary. He had not practised in the interval.

PATTESON, J.—He may be re-admitted on payment of the arrears of duty since the previous rule for his re-admission.

Rule accordingly.

CLOSE *v.* PARKER.

Service of a writ of summons on an agent of the defendant disallowed, though the last known residence of the defendant was in the plaintiff's own house, and though it was of no use to the plaintiff to proceed to outlawry it being an action for crim. con.

THIS was an action for criminal conversation with the plaintiff's wife. The defendant had last resided in the house of the plaintiff, from whence he eloped in *October*, 1834, and it could not be discovered where he was now living. A person named *Lee* received some rents for the defendant, and said he would forward anything to him, but refused to forward the writ of summons in this action, or to say where he was.

Chilton now moved for a rule that service of the writ of summons by delivery to *Lee* should be good service.—The plaintiff cannot proceed by *distringas*, as the last place of abode of the defendant, where the calls ought to be made, was the plaintiff's own house, and it would be absurd to make the calls there. It is also of no use proceeding by outlawry, as the object of the plaintiff is to obtain a verdict previous to applying to parliament for a divorce (*a*).

PATTESON, J.—In the case of *Hickman* v. *Dallimore* (*b*), the Court granted a *distringas*, although the three calls had not been made, but there the defendant's house was his own. The difficulty that the plaintiff is under is not a reason why I should grant this rule. It would be going too far were I to do so.

Rule refused (*c*).

(*a*) *See* Ray *v.* Dow. 5 Dowl. P. C. 310; and *Harding* v. *Manners*, 2 Har. & Wol. 80.
(*b*) 1 Har. & Wol. 524. 4 Dowl. P. C. 278.
(*c*) *See* this case again in *Easter* Term, post.

Bail Court.

Ex parte MOORE.

If a person convicted as a rogue and vagabond under 5 G. 4, c. 83, appeals to the quarter sessions, the convicting magistrate after the appeal is decided cannot recommit him for the rest of the time of his imprisonment.

MOORE, on the 15th of *April* last, was convicted by a magistrate as a rogue and vagabond, and sentenced to three months' imprisonment, under the stat. 5 G. 4, c. 83. He entered into the requisite recognizances to make his appeal to the Sessions, and was discharged. At the Sessions the matter was called on, and though a material witness was absent, the Court refused to put off the appeal, and it was in consequence struck out. The witness shortly afterwards appeared, and the Court refused to hear the appeal. The magistrate who originally convicted *Moore* then issued a warrant to apprehend him, and he was committed to *Bridewell* for the remainder of the three months, beyond the few days he in the first instance remained in prison.

J. Payne moved for a *habeas corpus* to the keeper of *Bridewell* in order that *Moore* might be discharged. He submitted that by the 14th section of the stat. 5 G. 4, c. 83, it was the duty of the Court of Quarter Sessions to issue a warrant for the apprehension of *Moore*, and that not having done so, the magistrate who originally convicted him could not do so, he being *functus officio*.

PATTESON, J., granted the writ.

J. Payne the next day, on *Moore* being brought up, moved that he might be discharged, and produced an affidavit that notice of the writ had been served on the convicting magistrate. He referred to the cases *The King* v. *the Justices of Middlesex* (*a*), *The King* v. *Bloxham* (*b*), and *The King* v. *The Justices of Warwickshire* (*c*).

PATTESON, J.—I think this is a clear case, and the party may be discharged.

(*a*) 3 Nev. & Man. 110. 5 B. & Adol. 1113. (*b*) 1 Adol. & El. 386. 3 Nev. & Man. 385.
(*c*) 1 Har. & Wol. 18. 2 Adol. & El. 768. 4 Nev. & Man. 370.

DOE, d. HAYNE and Others, *v.* ROE.

Service of a declaration in ejectment on the lessee of the premises, which he usually underlet to weekly tenants, but which had been unoccupied some time, held good service.

JAMES moved for a rule to shew cause why the service in this case should not be deemed good service. It appeared that the premises sought to be recovered were divided into six tenements, and had all been let by deed to one person. The ejectment was brought for forfeiture of the lease by non-payment of rent. The lessee usually underlet the premises to weekly tenants. There had been personal service on the tenants of five of them. The sixth had been for a long time unoccupied, and the declaration had been fixed on the door of the house, and had also been served on the lessee.

PATTESON, J.—If the lessee allows the premises to remain unoccupied, he may himself be considered as the tenant in possession. You may take your rule.

Rule granted.

Ex parte MISSING.

TIN moved to strike an attorney off the rolls on his own request. e affidavit on which he moved did not state the object the attorney view in being struck off the rolls, which it was submitted was not y, though usually inserted in the affidavit.

When an attorney applies to be struck off the roll, he should state his reason for so doing.

SON, J.—It is the usual practice, and I think I can see a reason why tice should be adhered to. If a person has no particular object in can get off the roll by not taking out his usual certificate, which nder his special application unnecessary. It will be better to add to avit what object the party has in being struck off the roll.

Rule refused.

Ex parte BLACK.

DSWORTH applied on the 23rd of *January* to allow Mr. *Black* to the affidavit in the Master's office, required by rule 6 of Hilary st (*a*), previous to his re-admission as an attorney of this Court on day of the present Term. The affidavit ought to have been filed e Term, which commenced on the 11th of *January;* but on going to ter's office on the 20th of *January*, Mr. *Black* first learnt that such vit ought to have been filed before the Term. It was submitted that pplications had been granted last Term, when it appeared that parties unacquainted with the new rule (*b*).

A person who was not aware of the new rule for the re-admission of attornies allowed to file his affidavit later than is required by the rule.

SON, J.—No similar application has been made so late in the Term resent, and I should have hoped that by this time the new rules had well known to every one; but if the affidavit shews that all has been at was necessary before the new rules, this application may be

Rule granted.

lar. & Wol. 639.

(*b*) *See* Ex parte Blunt, 5 Dowl. P. C. 231.

Ex parte COLLINS.

on the last day of term moved to re-admit an attorney. It was ed in the affidavit on which he moved, that since he took out his last te he had only practised in one particular instance. It appeared also

A judge at chambers in vacation cannot hear an application for the re-admission of an attorney.

Semble, that the re-admission of an attorney must positively be left before the term.

copy of the affidavit which is to be left with the chief justice's clerk previous to the

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Ex parte Collins.

that the affidavit required by the rule *Hilary* Term last, s. 6 (*a*), had been filed at the Master's office the day before the term, but the copy of the affidavit had not been left with the Chief Justice's clerk until the first day of the term. It was submitted that it was impossible to do that, as it could not be done of course until after the affidavit itself was filed. [Patteson, J.—Could it not have been left the same day? Is it accounted for why it was not?] No, it is not.

Jardine, on the part of the Law Society, opposed the re-admission on an affidavit shewing that the party had practised in other instances besides the one referred to, and contended that the rule ought moreover to have been complied with by leaving the copy of the affidavit before the term with the clerk of the Chief Justice.

Ball requested time to answer the affidavit as to the practising, and that the matter might be heard at chambers during the vacation.

Patteson, J.—In ex parte *Owen* (*b*), the Court said that that could not be done at chambers; it will therefore be better the matter should stand over until next term. Fresh notices had better be given for his re-admission then, as I think the rule for the re-admission ought to be refused now on the technical ground.

Rule refused.

(*a*) 1 Har. & Wol. 639. (*b*) 1 Dowl. P.C. 511.

Robins *v.* East.

If issue is joined in a country cause in *Trinity* Term, the defendant cannot have judgment as in case of nonsuit in *Hilary* Term.

Issue was joined in this cause, which was a country cause, on the 7th of *June* last, which was in *Trinity* Term, and the plaintiff had not proceeded to try it at the last assizes.

Knowles now moved for judgment as in case of nonsuit, and referred to a case which he understood Littledale, J., had decided last term (*a*), which was an authority, he believed, for moving for the rule.

Cur. adv. vult.

Patteson, J., the next day (*June* 12th).—I have spoken to my brother *Littledale*, and he says he did not intend, in the case referred to, to alter the practice of the Court. It is quite clear this rule cannot be granted.

Rule refused (*b*).

(*a*) *Robinson* v. *Taylor*, 2 Har. & Wol. (*b*) See *Douglas* v. *Winn*, 4 Dowl. P. C. 559, & *Heale* v. *Curtis*, 5 Dowl. P. C. 294.

LOVER *v.* TOLMIN.

ARCHBOLD moved to have a sum of money, which was deposited in lieu of bail, under the stat. 7 and 8 Geo. 4, c. 71, paid over to the defendant, a verdict having been found for him in the action. The only question was, whether the rule might be absolute in the first instance.

A rule for the defendant to have money out of Court, deposited in lieu of bail, is a rule *nisi* only.

PATTESON, J.—The rule must be a rule *nisi* only (*a*).

Rule *nisi* granted.

(*a*) S. P. *Wild* v. *Rickman*, 1 Har. & Wol. 670.

DOE, dem. SHEPPARD, *v.* ROE.

NEVILLE moved for judgment against the casual ejector. The notice at the foot of the declaration was addressed to two persons, father and son, who were both in possession of the premises. The father only had been served, and he said that his son was only in possession as his servant.

Service in ejectment on one only of two tenants who said the other was only his servant, held good.

PATTESON, J.—That is sufficient; at all events they are joint tenants.

Rule granted.

DOE, dem. WALTERS and Others, *v.* ROE.

MC. MAHON moved for judgment against the casual ejector on an affidavit intituled "Doe, on the demise of, &c." instead of "demises." He submitted that as the declaration was annexed, the omission was immaterial.

An affidavit in support of a motion in ejectment, intituled "Doe, on the demise, &c." instead of "demises," with the declaration annexed, held good.

PATTESON, J.—I think you may take a rule.

Rule granted (*a*).

(*a*) *See* the next case.

DOE, d. WATSON, *v.* ROE.

TOMLINSON moved for the landlord's rule in this ejectment, calling on the tenants to find security under the stat. 1 G. 4, c. 87, on an affidavit intituled "*Doe* v. *Roe*," not mentioning the name of the lessor of the plaintiff. That name however appeared from the declaration which was annexed to the affidavit.

An affidavit in support of a motion in ejectment intituled "*Doe* v. *Roe*," omitting the lessor's name, held bad, though the declaration was annexed.

PATTESON, J.—That is not sufficient, the affidavit must be amended.

Rule refused (*a*).

(*a*) *See* the last case.

Bail Court.

DOE, d. WILLS, *v.* ROE.

Judgment against the casual ejector granted, though the declaration was intituled of a year which had not yet arrived.

THE declaration in this ejectment was intituled by mistake in the 8th year of the King's reign instead of the 7th. The notice at the foot was dated the 5th of *January*, 1837, requiring the tenant to appear in the then next *Hilary* Term.

Cooper first moved to amend the declaration by inserting the right year of the reign, and was refused by PATTESON, J.; but afterwards, on the authority of the cases of *Doe*, d. *Gowland*, v. *Roe* (*a*), and *Doe*, d. *Smithers*, v. *Roe* (*b*), moved for judgment against the casual ejector.

PATTESON, J.—The mistake is of no consequence, for when the tenant appears he accepts a good declaration. The rule may be granted.

Rule granted.

(*a*) 5 Dowl. P. C. 273.
(*b*) 4 Dowl. P. C., 374, and see *Doe* v. *Roe*, 2 Dowl. P. 186.

Ex parte WYATT.

1. A writ of *habeas corpus* having been personally served in *France*, under the authority of the French Courts, this Court refused to grant a rule absolute in the first instance for an attachment for a contempt even under special circumstances.

2. Nor can a warrant be granted under the stat. 56 G. 3, c. 100.

IN *June* last a *habeas corpus* was obtained on behalf of *Thomas Wyatt*, directed to *William Henry Rochfort* and *Elizabeth Grey Wyatt*, the latter of whom was the wife of the applicant, to produce before the Court *Henry Herbert Wyatt*, the son of the applicant. It was obtained on the ground that Mrs. *Wyatt* was living in adultery with Mr. *Rochfort* at *Calais*. On the writ being applied for, it was intimated that the French Courts would recognise and give effect to it: when obtained, it was taken over to France, and proceedings were instituted against the defendants in the Court of *Boulogne*, within the jurisdiction of which *Calais* was situated, according to article 2123 of the Code Civil (*a*). A decree was obtained under those proceedings ordering *W. H. Rochfort* and Mrs. *Wyatt* to obey the writ. It appeared by the affidavits in support of the present application that that decree was conformable to the laws of France. It then became necessary, according to the law of France, to serve that decree on the defendant, who had removed to *Paris*. The decree and writ of *habeas corpus* were served there on *W. H. Rochfort* on the 7th of *December* last; and it appeared by

(*a*) That article is as follows:—"L'hypothèque judiciare résulte des jugements, soit contradictoires, soit par défaut, définitifs ou provisoires, en faveur de celui qui les a obtenus. Elle résulte aussi des reconnaissances ou vérifications, faites en jugement, des signatures apposées à un acte obligatoire sous seing privé.

"Elle peut s'exercer sur les immeubles actuels du débiteur et sur ceux qu'il pourra acquérir, sauf aussi les modications qui seront ci-après exprimées.

"Les décisions arbitrales n'emportent hypothèque qu'autant qu'elles sont revêtues de l'ordonnance judiciare d'exécution.

"L'hypothèque ne peut pareillement résulter des jugements rendus en pays étranger, qu'autant qu'ils ont été déclarés exécutoires par un tribunal Français; sans préjudice des dispositions contraires qui peuvent être dans les lois politiques ou dans les traités."

the process verbal of what was done on that occasion that he refused to deliver up Mr. *Wyatt's* son unless he was paid for his board for five years past. He also gave as an excuse that the boy was earning one guinea a week as a civil engineer, which he could not give up. Mrs. *Wyatt* was said to be unwell, and unable to see any one. It was sworn on this application that every thing was done conformable to the law of France to make that a good service. It was also stated that by the French laws the proceedings could not be carried any further than that service, there being no law authorising an arrest in such a case. Mrs. *Wyatt* had had a child by *W. H. Rochfort*, and an action had been commenced against him by Mr. *Wyatt* for criminal conversation. *W. H. Rochfort* had lately come over to this country, leaving Mrs. *Wyatt* and her son behind, and having been arrested for debt, was now detained in the King's Bench prison on two detainers. Since he had been there he had said he should resist the authority of the Court as much as he could. He was endeavouring to find bail, and it was expected he would immediately on procuring it go back to *France*.

J. Bayley now applied for an attachment against *W. H. Rochfort*.—The object of the applicant in this case is to attach *W. H. Rochfort* for the contempt in not obeying the writ of *habeas corpus* served on him in *France*. It is of no use effecting a fresh service now, as he would make a return to the *habeas corpus* that the applicant's son is not under his control. It is necessary therefore to shew that the service of the *habeas corpus* in *France* was such that this Court will attach him for a contempt in not obeying it. It appears from the affidavits that this service was a good service according to the French law, and being so, and there having been clearly a personal service, this Court will recognise it, although it was effected out of the jurisdiction of the Court. [PATTESON, J.—Before granting an attachment there must have been a good service of the writ, and I do not see how I can say this was a good service, having been effected out of the jurisdiction of the Court. Even if I recognise the French laws, and grant that the service was properly effected according to those laws, still it remains a question whether that service is good by the English laws, so as to make a contempt of the English Court. The place where the service was effected is material.] This Court will recognise the French laws, in cases where, under those laws, an arrest has been made in *France* on a *capias* in an action commenced in this country. [PATTESON, J.—In that case the party is arrested under the authority of the French Courts, and is brought here: when here, he is in custody under the writ of this Court, and the Court will not require by what means he is brought here.] The case of *Hopcraft* v. *Fearmor* (*b*), though differing from the present, is an authority for this application (*c*).

PATTESON, J.—On the authority of that case you may have a rule *nisi* for an attachment.

J. Bayley.—A rule *nisi* will be of no avail, as it is probable that before it can be made absolute *W. H. Rochfort* will obtain bail and go back to

(*b*) 1 Bing. 378; 8 Moore, 424.
(*c*) *See* also *Weatherhead* v. *Landles*; 5 Dowl. P. C. 189.

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France. It is clear that the applicant has a right to the custody of his own child, and this Court will do what it can to assist him. Perhaps a warrant may be granted for the neglect to obey the writ of *habeas corpus* under the provisions of the stat. 56 G. 3, c. 100.

PATTESON, J.—It is clear a warrant cannot be granted under that act, which on reference to the first section appears not to extend to the case of a person confined in Scotland, and therefore, *à fortiori*, not to one confined in France. I cannot do more than grant a rule *nisi* for an attachment. I even question if it can afterwards be made absolute, as I doubt the authority of the case of *Hopcraft* v. *Fermor*. You may take either a new writ of *habeas corpus* or a rule *nisi* for an attachment.

New writ of *habeas corpus* granted.

HOWARD *v.* CANFIELD.

If a witness, at the time of giving his evidence, has no recollection of a fact except from an entry in a book, his evidence of that fact cannot be received unless the book is produced.

THIS was an action on the warranty of a horse. At the trial before the under-sheriff, it became a material question on what day one of the plaintiff's witnesses, who was a farrier, had seen the horse. He deposed to a certain day, and on his cross-examination said, "I have no memory of the day, except from my book: I know from my book it was the 16th. When I looked at my book it called the day to my recollection." On his re-examination he said, "I have not seen the book for some time: I looked at the book with a view to ascertain the date, to see that my memory did not deceive me: I had recollected the day before I looked at the book." It was objected at the trial, that this evidence of the day when the witness saw the horse could not be admitted, as the book itself was not produced. The evidence was, however, admitted, and a verdict was found for the plaintiff. A rule *nisi* having been obtained for a new trial,—

F. V. Lee shewed cause.—The general rule no doubt is, that if a witness has no recollection whatever of a fact, except from a memorandum in a book, that that book must be produced: *Doe*, d. *Church*, v. *Perkins* (*a*), *The King* v. *St. Martin's, Leicester* (*b*). This case, however, is taken out of that general rule, as, from the answer given by the witness on his re-examination, it is clear he had *some* recollection of the date besides what was furnished him by the book.

Byles, contrà.—The two first answers of the witness on his cross-examination alone refer to the state of the witness's memory *at the time of the trial*, and from those answers it appears he *then* had no recollection except from his book. The third answer on his cross-examination, as well as the answers on his re-examination, refer to the state of his memory *at a previous time*. Having, therefore, no memory, *at the time of the trial*, of the day except from his book, it ought to have been produced.

(*a*) 3 Term Rep. 749. (*b*) 2 Adol. & El. 210; 2 Nev. & Man. 202.

COLERIDGE, J.—It is clear from the cross-examination of the witness that his evidence was not admissible without the book itself being produced. It is argued that by his re-examination it was made admissible; but I think that re-examination ought to have been directed to the state of the witness's memory at the time of the trial, whereas it was directed to a by-gone time. The book therefore not having been produced, this rule must be made absolute.

Rule absolute.

The KING *v.* The POOR LAW COMMISSIONERS.

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The Poor Law Commissioners have not power, under the 4 and 5 W. 4, c. 76, s. 39, to order the election of a board of guardians for the administration of the relief of the poor in the parish of St. Pancras, that parish having already a Board of Directors under a local act.

PREVIOUS to the passing of the Poor Law Amendment Act, 4 and 5 W. 4, c. 76, the parish of *St. Pancras* was governed by a select vestry, consisting of 122 persons, under a private act, 59 G. 3, c. 39. These vestrymen were elected for life, and were bound to have certain qualifications. By s. 41 the vestrymen were to elect annually out of their own body forty directors of the poor. These directors were to have the management of the poor. The vestrymen were to have the raising of the poor rates. The parish afterwards adopted the Act 1 and 2 W. 4, c. 60 (Sir *John Hobhouse's* Act), by which it was enacted that one-third of the vestrymen should go out of office every year, and under which the qualification was lower than that required by the local Act (*a*). On the 25th of *April* last the Poor Law Commissioners, without obtaining any consent on the part of the parish, or of the directors of the poor, made an order that the relief of the poor in the parish should be administered by a board of guardians consisting of twenty persons; and that they should be elected and constituted according to the provisions of the stat. 4 and 5 W. 4, c. 76, in the manner set forth in the order. The right of the Poor Law Commissioners to make this order in the parish, governed as it was by a local act, was disputed, but twenty persons were elected, all of whom had previously been directors of the poor under the local Act. These twenty persons afterwards met, but refused to act, and an order was made on the 9th of *July*, by the Poor Law Commissioners, to proceed to act by electing a chairman and vice-chairman, and otherwise obey the orders of the Commissioners. This order was unattended to, and accordingly a rule *nisi* for a *mandamus* was obtained, on the part of the Poor Law Commissioners, to enforce obedience to that order; notice was afterwards given under the 106th section of the Act, by two of the persons elected guardians, that a writ of *certiorari* would be moved for, to remove into the Court of King's Bench the order of the 25th of *April* directing the election of the guardians.

Sir *F. Pollock*, *Prendergast*, *Austin* and *Thomas*, in *Michaelmas* Term last, shewed cause against the rule for the *mandamus*.

(*a*) With reference to the adoption of this act by the parish of *St. Pancras*, see the cases of *The King* v. *The Churchwardens of St. Pancras*, 1 Adol. & El. 80; 3 Nev. & Man. 425, and *The King* v. *The Trustees of the New Church of St. Pancras*, 5 Nev. & Man. 219.

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Adams, Serjt., appeared for the *ex-officio* guardians.

Lord DENMAN, C. J., then intimated that the Court had great difficulty in disposing of the question on the rule for the *mandamus*, as it was in form drawn up for a *mandamus* to the guardians entitled to act as such under the Poor Law Amendment Act, and that on the *mandamus* issuing, the persons elected might say they were not entitled to act as such guardians.

Sir *F. Pollock*, according to the notice given, then moved under the 106th section for a *certiorari* to bring up the order of the Commissioners of the 25th of *April*, the rule for the *mandamus* being allowed to stand over.

The *Attorney General*, Sir *William Follett*, *Wightman*, and *Tomlinson* then shewed cause in the first instance under the 106th section, and were answered by the other side. The arguments on both sides are fully adverted to in the judgments given.

Cur. adv. vult.

This Term the Judges, before whom it was argued, delivered their judgments.

COLERIDGE, J.—This was a case in which the Poor Law Commissioners for England and Wales shewed cause in the first instance, under the 106th section of the 4 and 5 Will. 4, c. 76, against a rule for a *certiorari* to remove, for the purpose of quashing, an order issued by them to the Board of Directors for the parish of *St. Pancras*, by which they were directed to elect twenty guardians of the poor for that parish; and the question for our decision is the validity of that order under the circumstances, few in number, which I am about to state.

At the time of issuing the order, the parish was and ever since the passing of the 59 Geo. 3, c. 39, a local act, had been under the government of authorities constituted by that act with various powers, and, among others, with that of administering the relief of the poor, and a Board of Directors, forty in number, were entrusted with the immediate management of that relief. It is contended, on the part of the vestry, that this local act prevents the Commissioners from constituting a new board of guardians of the poor.

On the part of the Commissioners, it is urged, that that circumstance does not deprive them of the power which they derive for this purpose from the 39th section of the act. It is enacted by that section, that if the Commissioners "shall, by any order under their hands and seals, direct that the administration of the laws for the relief of the poor of any single parish should be governed and administered by a Board of Guardians, then such Board shall be elected and constituted, and authorised and entitled to act, for such single parish, in like manner in all respects as is hereinbefore enacted and provided in respect to a Board of Guardians for united parishes; and every justice of the peace resident therein, and acting for the county, shall be and may act as an *ex-officio* member of the Board."

The whole question turns upon the meaning properly to be given to this section. It will be observed, that it does not in direct terms give the power

of constituting a board of guardians in single parishes, but rather seems directed to the election and attributes of such board, if they shall exercise the power of erecting one. But assuming, as I think we must, and which has not been contested in the course of the argument, that the grant of such a power to the Commissioners must be implied from the language of this section, I do not see how it can be denied that the words, entirely unrestrained as they are, are large enough to extend to single parishes, under whatever circumstances they may be, and so to authorise the order in question with regard to *St. Pancras*.

It is in my opinion so important for the Court, in construing modern statutes, to act upon the principle of giving full effect to their language, and of declining to mould that language in order to meet either an alleged convenience or an alleged equity, upon doubtful evidence of intention, that nothing will induce me to withdraw a case from the operation of a section, which is within its words, but clear and unambiguous evidence that so to do is to fulfil the general intent of the statute; and also that to adhere to the literal interpretation is to decide inconsistently with other and overruling provisions of the same statute. When the evidence amounts to this, the Court may properly act upon it, for the object of all rules of construction being to ascertain the meaning of the language used, and it being unreasonable to impute to the legislature inconsistent intents upon the same general subject matter, what it has clearly said in one part must be the best evidence of what it has intended to say in the other; and if the clear language be in accordance with the plain policy and purview of the whole statute, there is the strongest reason for believing that the interpretation of a particular part, inconsistently with that, is a wrong interpretation. The Court must apply in such a case the same rules which it would use in construing the limitations of a deed; it must look to the whole context, and endeavour to give effect to all the provisions, enlarging or restraining, if need be, for that purpose the literal interpretation of any particular part. Upon an attentive consideration of the several clauses of this statute, a consideration necessarily the more attentive, because one of my learned brothers has formed a different opinion, it seems to me, that the general words of the section in question must receive a restrained construction. It will be necessary, in order to justify this opinion, to examine the statute more in detail than I could have wished, but before I do so, I think it right to premise a remark, which must be borne in mind in order to give to the evidence resulting from this examination its due weight. The remark is this, that we are dealing with a statute which has reference not so much to the common law as to a large number of previous statutes; that its general intent is in accordance with them, except where it makes out in express language their partial repeal or modification. I find it therefore more difficult to adopt that construction, which supposes an intent to repeal them, as to other important but unspecified provisions, by implication. The large and literal interpretation of this clause will certainly become more improbable, if it shall appear to be at variance, not only with the clear intent and meaning of other unambiguous clauses in the same statute, but if it will also have the effect of repealing in part a former statute, one of a class too manifestly in the contemplation of the legislature, when this act was framed, expressly subjected to its operation in some particulars, and expressly saved

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from it in the main. In the case of *Williams* v. *Pritchard* (*b*), Lord *Kenyon* uses language applicable to this part of the subject. "It cannot be contended that a subsequent Act of Parliament will not control the provisions of a prior statute, if it were intended to have that operation; but there are several cases in the books to shew, that where the intention of the legislature was apparent, that the subsequent act should not have such an operation, there, even though the words of such statute, taken strictly and grammatically, would repeal a former act, the Courts of Law, judging for the benefit of the subject, have held that they ought not to receive such a construction."

The first section, to which it is important to look in this examination, is the fifteenth, which describes generally the powers and duties of the Commissioners. By this, although the administration of relief to the poor is made subject to their direction and control, yet that is still to be "according to the existing laws, or such laws as shall be in force at the time being." And they are empowered to issue orders "for the guidance and control of all guardians, vestries, and parish officers." The term "guardian," by the 109th section (the interpretation clause) including "any visitor, director, or other officer in a parish, appointed or entitled to act as a manager of the poor, and in the distribution or ordering of the relief to the poor under any local Act of Parliament." The Directors, therefore, of *St. Pancras* may be guided and controlled under this section; but the management of the poor cannot be taken from them.

The 21st section, which is the next affecting this question, is more explicit to the same purpose; for it enacts that, except where otherwise provided for by the act, all the powers given by any Act of Parliament, general as well as local, "in any way relating to the relief of the poor, shall in future be exercised by the persons authorised by law to exercise the same, under the control, and subject to the rules, orders, and regulations of the Commissioners, and they and the Assistant Commissioners shall be entitled to attend at every parochial and other local board and vestry, and take part in the discussions, but not to vote."

The 22nd section restrains the authorities under any local act relating to the relief of the poor from making henceforward any new rules, orders, or regulations, until the same shall have been submitted to and approved and confirmed by the Commissioners.

Thus far it cannot be doubted that the express object of the statute is to obtain an improvement and uniformity in the management of the poor, not by creating any new machinery in the parishes, but by preserving that which existed, whether under general or local acts, and submitting it to the guidance and control of the Commissioners.

By the 26th section the Commissioners are empowered "to declare so many parishes as they may think fit to be united for the administration of the laws for the relief of the poor;" and by sect. 32, from time to time to dissolve, add to, or take from, any union, whether formed before or after the passing of the act, provided that no such dissolution, alteration, or addition shall be made unless two-thirds of the guardians of such union shall concur therein. The 38th section enacts, that wherever a union shall be formed by order or with the concurrence of the Commissioners, a board of guardians

(*b*) 4 Term Rep. 2.

shall be constituted and chosen for such union, and the relief of the poor in such union shall be administered by such board.

These sections, from the 26th to the 38th inclusive, with the intermediate and unnoticed sections, extend the powers of the Commissioners to the constitution, dissolution, and alteration of parochial unions, and to the establishment of boards of guardians; but it is remarkable, that when they come to the alteration of existing unions they cannot proceed without the consent of two-thirds of the guardians already constituted.

The 39th section, on which the question turns, follows. I have already stated it. It appears to me that no one reading it, even by itself, would suppose it intended to apply to any single parish in which the administration of the poor laws was already in the hands of a board of guardians. The obvious intention seems to be, merely to give the Commissioners the power to introduce the same system of government, by a board of guardians, into single parishes in which it did not exist before, as they were directed to introduce into the unions which they should form or concur in forming. The argument to be derived from this is not without strength in itself; it is founded on the very words and form of expression used in the section, but it receives a great increase of force, where it is found to harmonize so exactly both with the constitutive and conservative parts of the previous sections of the act. It agrees with the former in enabling the boards to be established where none existed before; with the latter, where such a board exists, in leaving the persons authorised by law, in the language of the 21st section, to exercise the powers of their local act relating to the relief of the poor in both cases; still effectuating the main object of the act, that all shall be under the guidance and control of the Commissioners.

A few sections, however, still remain to be noticed, which serve to throw a stronger light upon the true meaning of this section. The 40th enacts and describes in detail a new mode of voting, which is to be observed in all cases of the election of guardians under this act; and the 41st section enacts, in express terms, that all elections of guardians under any local act "shall hereafter, so far as the Commissioners shall direct, be made and conducted according to the provisions of this act." It may reasonably be asked, why introduce this express power to regulate the elections of these local boards, if they held their existence, as boards for the management of the poor, only at the pleasure of the Commissioners? But to this clause is attached a proviso still more important to the argument: by this the Commissioners are empowered "to make such alterations in the number, mode of appointment, removal, and period of service, of the guardians, or any of them" of any parish or existing union, as to them shall seem expedient; *but this only with the consent of the majority of the owners and rate-payers.* Can they then make such alterations as above specified, only with the consent of the parish, and may they destroy the same board by their mere order? It was urged, I am aware, that the present order does not destroy the local board in *St. Pancras*, that the management of the poor was but one of its functions, and that it will still subsist for many important purposes. I do not stop to notice the inconvenience of this double machinery; but in truth, is the fact alleged in this particular case any answer to the general argument? Those who contend for the validity of this order must maintain that the Commissioners would equally have had the power to issue it, if the local board had existed only as a

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board for the management of the poor, and then they must have contended that those could destroy at pleasure who could only alter by consent.

I have carried this examination far enough to satisfy my own mind that this order is not warranted by the statute. I am not unaware of the forcible remarks to which the general words of the 39th section, and, perhaps, of some other clauses, may give rise, and I have come to the conclusion which goes to restrain those words very reluctantly. But the sum of the arguments to which I have been obliged to yield is this—the clause itself appears, on the reading it by itself, not to have been intended to apply to cases of parishes with existing boards; then I find that to construe it as not having that application, makes it agree with a prevailing tendency in the other sections not to destroy existing boards or repeal local acts, but to make them subserve the general policy of the act by putting them under the guidance of the Commissioners, making its provisions in certain specified matters override those of the existing statutes, but in general adopting and harmonising with them. I further find that to suppose the section intended to destroy such boards, is to make it at variance with many sections which either provide for or directly contemplate their continuance; and I lastly find a provision with respect to the future elections, and possible alterations by consent, in the number and period of service of the members, which seems wholly inconsistent with the notion that the future existence of the board was entirely at the discretion of the Commissioners.

If the 39th section had contained the words "whether in such parish there be or not any existing board of guardians," or any equivalent words following the words "any single parish," no argument could have arisen, but I should have found it impossible to reconcile all the clauses as I now can. No such words are there, and I cannot conceive that they are omitted either inadvertently or with intent to give to the Commissioners, covertly, a power over a large number of parishes, and those the most populous and influential, which if conferred in express terms, would undoubtedly have occasioned much question. Upon the whole, I am of opinion that this order must be quashed.

WILLIAMS, J.—I have the misfortune to differ from the rest of the Court, and therefore it is a satisfaction to me that the result will not be affected by that circumstance. The question before the Court is, whether the order of the Poor Law Commissioners, already referred to, can be sustained; and that depends upon the proper construction of the 38th and 39th sections of 4 and 5 Will. 4, c. 76, particularly the latter, considered, I agree, in connexion with the other parts of the act. The general object of it certainly is, to bring the administration of relief to the poor throughout the country under the order and disposition of the said Commissioners, and very large and extensive powers are unquestionably conferred upon them for that purpose. The first fourteen sections of the act relate to the appointment of Commissioners and Assistant Commissioners; and in the 15th section the power alluded to is thus given, viz.: "The administration of relief to the poor throughout England and Wales, according to the existing laws, or such laws as shall be in force at the time being, shall be subject to the direction and control of the said Commissioners;" and there are enumerated a variety of particulars which are embraced in the above description, including the power

of making rules, orders, and regulations for the guidance and control of all guardians, vestries, and parish officers. Now this section, which is certainly one of the most important in the act, seems to me to have for its object only to give power to the Commissioners over the actual managers of the poor in each parish and district, and to have no reference to any particular descriptions of managers, or to the mode of their appointment. And accordingly we see in the explanatory clause (s. 109) that the word "guardian" means throughout the act *any* visitor, governor, or director, in short any person intrusted with the management of the poor. It seems to me important to bear in mind the precise object of this section, because the mode of election is made the subject of very particular and minute regulations in the 40th section; and the right of voting there prescribed differs, so far as I am aware, from any before in use in this country. I allude to the right of voting conferred upon the owners of property, which, though not practised here, has, it is said, been long prevalent in Scotland. The 26th section empowers the Commissioners "to declare so many parishes as they may think fit united for the administration of the laws for the relief of the poor;" and by sections 33 and 34 powers are given to the guardians of any union, with the consent of the Commissioners, to make such union one parish, for purposes of settlement and of rating; and by the 37th certain unions, without consent of the Commissioners, are prohibited. Then comes the 38th and 39th sections, upon which the question mainly turns. Before adverting to them, however, it is material to notice the general power of forming unions under the 26th section, because the unrestrained nature of it, as I understand its language, seems to me to throw some light upon the 39th section, where the power of Commissioners is to be considered in the case of a single parish. Now the 26th section runs thus: "It shall be lawful for the said Commissioners, by order under their hands and seal, to declare so many parishes as they may think fit to be united for the administration of the laws for the relief of the poor, and such parishes shall thereupon be deemed a union for such purpose," &c. There is no exception, no restraint; and accordingly it seems to me that the most obvious and manifest repugnancy in other parts of the act to the general meaning of this clause should be pointed out, before we are authorised to read it as if after the word "parishes" had been introduced, "except such as are governed by a local act." It seems to me, I confess, to include all of every description. By the 38th section it is provided that in all cases of union under the 26th section, the generality of which I have noticed, by the order or with the concurrence of the Commissioners, a board of guardians of the poor shall be constituted and chosen, and the government of the workhouses, and administration of relief of the poor, shall be under the control of such guardians, and the said guardians shall be elected by the rate-payers and owners of property. Then follow the regulations before alluded to, as to the mode of voting, with limited powers to the Commissioners as to the number of guardians, which number, however, they cannot reduce below one for each parish of the union. It is necessary to advert thus much to the provisions of the 38th section, although the question arises immediately upon the 39th, because the former is, in the most essential part, directly incorporated in the latter. The clause is in the following words. (His Lordship here recited the 39th section.) The effect of the order in question is to reduce the

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number of persons from 40, the present number of directors under a local act governing the parish of *St. Pancras*, to 20, and to introduce the new mode of election prescribed by the 40th section. The effect is not necessarily to produce any greater change. By the new mode of election, for any thing that appears, the twenty to be chosen may be out of the present forty directors. The change therefore would be only in the number of persons to whom the management is deputed. Whether those persons be twenty, under the newly prescribed form of election, or the forty directors under the local act, it is, I think, unquestionable that "rules, orders, and regulations," for their guidance and control, may be equally issued by the Commissioners; and it is probable, to say no more, that the same rules would be issued, whichever management may prevail. I notice this in passing, for the purpose of shewing that the question is probably not quite of so much importance as has been attributed to it. The question itself of course remains the same, and it is as I at first stated it.

The language of the 39th section is certainly very large and general. There is no restriction expressed, (as I have already observed is the case with respect to what I consider the corresponding power of forming unions under the 26th section,) although it is obvious how easily and briefly such restriction might have been introduced, to prohibit the interference of the Commissioners in the case of a parish governed by a local act. Where the words "single parish" are introduced, there is no such exception, nor any proviso to produce the same effect, fertile as the act is of provisoes, some of them too, as were pointed out by my brother *Patteson*, of a novel and extraordinary description. In estimating the effect to be given to this general language, unrestrained, as has been observed, it is impossible to overlook entirely the new mode of election introduced by this act, combined with a power of regulating the number to be elected. How far it may have been the policy of the legislature, by this provision, to extend to all parishes (however circumstanced) the benefit of this plan, and what degree of importance was attached to it, I am not prepared to say. Certain, however, it is, that in proportion as the power of the Commissioners is extended, this mode of election, with the control above mentioned, is extended likewise.

The 41st section was much relied upon against the order. (His Lordship recited it.) From this it appears that the Commissioners may, in the case of guardians of a parish or union (existing at the time of its passing), *under the said act, appointed* by the consent of such majority as is there mentioned, make alterations in the duration of the service of guardians; and also "to make such alterations in the number, mode of appointment, removal and period of service of the guardians, or any of them, of any parish or of any union now existing or to be formed under the provisions of this act, as to the said Commissioners, with such consent as aforesaid, shall seem expedient." And the argument was, that it is strange and seems inconsistent, that the Commissioners should have power, by resorting to the measures which they are authorised to take under the 38th and 39th sections, at their own discretion to require a new election of guardians under the new mode, whereas by the section under consideration, they cannot make even alterations without the consent therein specified. It is to be observed, however, that the first branch of this 41st section speaks of guardians *appointed under this act*, and if so, it includes those appointed under the 38th section, over which appoint-

ment, though the election be with owners of property and rate-payers, the Commissioners have a power as to the number and qualification of the guardians. I cannot therefore see that it is necessarily inconsistent, or undertake to say that the legislature might not have meant that the Commissioners, having once exercised their authority at the original election as to the number of guardians, should not be allowed to disturb it, or again to interfere without the consent specified in this 41st section. The latter branch of this same section has the words "guardians of any parish or union now existing," without the addition of the words "appointed under this act;" and as they are omitted, and as the power of the Commissioners is somewhat different from that conferred upon them in the earlier part of the section, I presume that these latter words must be understood to mean any "managers" of the poor, existing at the time of the passing of the act; the interpretation clause (as already observed) having so defined the meaning of the word "guardian," still the Commissioners need not interfere; and if they see nothing wrong in the actual management, it is perhaps difficult to discover any good reason why they should. Whether in the present instance or any other it be wise or politic to do so, is another question with which we have no concern. I am, however, by no means satisfied that the meaning of the legislature, in this latter branch of the section now under consideration, may not have been, that if the Commissioners so far testified their approbation of the existing authorities and management in any given parish, as not to deem it necessary either to throw it into a union under the 26th section, or, if the phrase may be allowed, to make it an independent union under the 39th, they should not be allowed to make any alterations at all without the consent in this 41st section specified. If the latter branch of the section be the same in construction as the first, then the observations made upon the former branch are applicable to the whole.

The 54th section was also brought under our notice, as being opposed to the validity of the order. It seems necessary, in order to form a proper estimate of the bearing of this section to advert to the preceding, the 53rd. That repeals three distinct acts of parliament, viz., 36 Geo. 3, c. 23, the 55 Geo. 3, c. 137, and the 59 Geo. 3, c. 12. By the first of these acts, the overseers, under certain circumstances, were allowed to give relief to poor persons at their own homes; and by all three a similar power was given, under more or fewer restrictions, to a justice or justices of the peace. The object of course was to take away all these powers; and that being effected, the 54th section enacts, that where there is any body entrusted with management of the poor, whether guardians, select vestry, or however composed, the ordering of relief shall be vested in that body alone. There is a saving of the powers conferred upon the Commissioners by the act; but independent of this, the view and object of the section seems to me to be what I have mentioned, and not to bear upon the precise question of the power of the Commissioners in this instance. Whether the old board of directors in the parish of *St. Pancras* should remain, or whether there be an election under the new method prescribed by the act, this power, as contrasted with the overseers and justices of the peace under the repealed statutes above mentioned, would, as it seems to me, be vested equally in either. It was further urged in argument, that the order cannot be sustained, because it directs a board to be

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constituted of the description therein mentioned, whereas there is already a board existing. But taking the whole order together, it seems to me to appear sufficiently, that the board mentioned in the order is a board to be appointed under the new mode of election prescribed in the 40th section, which must differ in number from the existing one, and may differ also as to the persons of whom the more limited number is composed, according as twenty of the present persons may or may not be re-elected.

For these reasons, such as they are, and without my placing any thing like implicit confidence in them, it seems to me that the express words of the 39th section, enjoining that where an order of the Commissioners shall direct that "the laws for the relief of the poor of *any single parish* shall be governed and administered by a board of guardians, then such board *shall* be elected and constituted, and authorised and entitled to act for such single parish, in like manner" as in the 38th section is provided, are not so far varied or contradicted by any conflicting enactment, as to prevent them having the effect which, taken by themselves, they import, and that therefore the order may be sustained.

PATTESON, J.—This is an application for a writ of *certiorari* to remove an order of the Poor Law Commissioners for England and Wales, into this Court, under the 105th section of 4 and 5 Will. 4, c. 76, and cause was shewn in the first instance, under the 106th section of the same act, empowering the Court forthwith to hear and determine the same.

The order bears date the 25th *April*, 1836, and is signed by the three Commissioners, and is under their seal, and by it they order and declare that the laws for the relief of the poor of the parish of *St. Pancras* shall, after the 11th day of *May* next, be administered by a board of guardians, consisting of twenty members, and that such board of guardians shall be elected and constituted according to the provisions of the Poor Law Amendment Act, and in manner thereinafter set forth. The laws for the relief of the poor in the parish of *St. Pancras* were at that time administered by a board of directors, consisting of forty members, under a local act affecting that parish only.

The order is issued under the 39th section of the 4 & 5 Will. 4, c. 76, which enacts, "that if the said Commissioners shall, by any order under their hands and seal, direct that the administration of the laws for the relief of the poor of any single parish should be governed and administered by a board of guardians, then such board shall be elected and constituted, and authorised and entitled to act for such single parish in like manner in all respects as is hereinbefore enacted and provided in respect to a board of guardians for united parishes; and every justice of the peace resident therein and acting for the county, riding, or division in which the same is situated, shall be and may act as an *ex officio* member of such board". The language of this section, it may be observed, does not in direct terms give the Commissioners power to order that the poor laws shall be administered by a board of guardians in a single parish, but enacts, that if they shall so order, the board shall be elected in the same manner as a union board. The power, however, seems to be necessarily implied. The order is resisted upon the ground that this section was not intended to apply to a single parish governed by a local act, and having already a board of guardians or directors, which for this pur-

ose is the same thing, but only to such single parishes as were under the ordinary government of overseers, and as the Commissioners might think not proper to be joined with other parishes in a union.

The Court is now called upon to construe this section, and is urged to decide, from the generality of the expressions used in it, that it applies to all parishes without any limitation, and that it necessarily gives an implied power to the Poor Law Commissioners to repeal, at their will and pleasure, all local acts, so far as they regard the administration of the poor laws; for that such would be the effect of the construction prayed for is undeniable.

If the legislature intended to give so extensive a power to the Commissioners, it might reasonably have been expected that it would have done so in express terms; and accordingly, in the 41st section a power of altering the mode of election under local acts is given in express terms. Even without express terms, if the 39th section would be inoperative unless such constructions were put upon it, the Court might be compelled to infer that such a power was implied. If, however, the section can be made fully effectual by a more limited construction, there can be no conclusive proof that the more extensive power was contemplated by the legislature; and if such limited construction should appear to be in accordance with the other sections of the act, the Court might possibly, if it were to decide in favour of the power claimed by the Commissioners, give that which the legislature intentionally withheld.

One of the main objects of the act appears to be, to provide for a uniform administration of the poor laws. With this view the 15th section enacts that the administration of the poor laws according to the existing laws shall be subject to the direction and control of the Commissioners, and a general power is given to them to make rules for the guidance and control of all guardians, vestries, and parish officers in the management of the poor, the audit of accounts, entering into contracts, and carrying the act into execution; the Commissioners prescribing the method, but the guardians or other bodies performing the actual duty. And section 21 expressly enacts, that except where otherwise provided by this act, all powers given by any general or local act relating to the relief of the poor, shall "be exercised by the persons authorised by law to exercise the same under the control and subject to the rules" of the Commissioners.

Now these sections point at the continuance of the existing guardians and other officers, subject to the control of the Commissioners, while no express authority is given to them to dismiss any guardians, or to repeal the provisions of any local act, either by these or any other sections of the act. Section the 26th empowers them to unite parishes. (His Lordship here recited the 26th section.) The words here used are as general as can well be conceived; they give the power in distinct terms, and would appear to apply to all parishes throughout the kingdom, containing no exception of parishes already united; and yet it must be read with such exception and limitation; for by section 32 the Commissioners are prohibited from dissolving or altering existing unions, without the consent of two-thirds of the guardians. The generality of the words of any section in this act is not therefore conclusive as to the real meaning of that section. By the 38th section, a board of guardians must be constituted for every union of parishes established under

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this act, but no mention is made of any new board in the cases of existing unions.

Next comes the 39th section, on which the case depends. The immediate object of this section, as it seems to me, is to enable the Commissioners to cause the poor laws to be administered by a board of guardians in a single parish, without driving them to the necessity of uniting that parish with one or more others, for the purpose of having such a board. The legislature might well consider that some parishes are so large and populous, that the Commissioners might judge it expedient that they should not be united with any other, and yet that the poor laws ought to be therein administered by a board of guardians. It is, however, contended, that under this section the Commissioners have powers, where a board of guardians, under a local act, already exists in a single parish, to supersede the board so far as regards the administration of the poor laws, and to order a new board to be elected under this act. It is conceded that the old board must in most instances remain, having other duties besides the administration of the poor laws, though no words are pointed out leading directly to any such conclusion.

The 40th section regulates the mode and scale of voting, giving owners as well as occupiers the right of voting, thereby introducing a new class of voters, unheard of before, and also regulating the number of votes which each person shall have by the value of his property; which scale of voting appears to be a favorite object throughout this act.

The 41st section enacts, "that all elections of guardians, visitors, and other officers for the execution of any of the powers or purposes of the said recited act, made and passed in the twenty-second year of the reign of his said late Majesty King George the Third, intituled, 'An Act for the better relief and employment of the poor,' or of any local act of Parliament relating to poor-houses, workhouses, or the relief of the poor, or any act to alter or amend the same respectively, shall hereafter, so far as the said Commissioners shall direct, be made and conducted according to the provisions of this act; provided always, that it shall be lawful for the said Commissioners, if they shall so think fit, from time to time, with the consent of the majority of the owners of property and rate-payers of any parish, or of any union now existing, or to be formed under the provisions of this act, to *alter* the period for which the guardians to be appointed under the provisions of this act, for such parish or union, or any of them, would under the provisions of this act hold office, for such other period or periods as to the said Commissioners, with such consent as aforesaid, shall seem expedient; and *also to make such alterations* in the number, mode of appointment, removal, and period of service, of the guardians or any of them, of any parish or of any union now existing or to be formed under the provisions of this act, as to the said Commissioners, with such consent as aforesaid, shall seem expedient." This section is not very intelligible; but thus much is clear, that an existing board of guardians of a parish under a local act may be continued; that the mode of their election may be altered by the Commissioners of their own authority, but their number, mode of appointment, removal and period of service, cannot be altered except by consent of a majority of owners and rate-payers; and the board will be under the control and subject to the rules of the Commissioners. It is not denied that the Commissioners may so continue an existing board, but

it is said that they are not obliged to do so by reason of the generality of the words of the 39th section, and that they have the option, either to continue and modify the existing board, under the 41st section, or to abolish it altogether under the 39th. No such option is given to them as to existing *unions*, notwithstanding the general words of the 26th section. Nor can I see any thing to lead me to the conclusion that it was intended by the legislature to give such option as to single parishes, except the general words of the 39th section. The 54th section again speaks of guardians under local acts exercising powers, but saves the power of the Commissioners.

Upon the whole of this act it appears to me that the legislature intended to make use of all existing boards of guardians or directors (for their appellation makes no difference); to subject them to the control of the Commissioners; and to alter the mode of their election at the discretion of the Commissioners; but not to abolish any of them, or alter their number, without the consent of the majority of the owners and rate-payers.

It further intended to enable the Commissioners to unite parishes and constitute boards of guardians in single parishes not already having boards. But I cannot any where find any words authorising the abolition of a board of guardians (except in the case of a dissolution of an existing union by consent), nor the taking away from an existing board of guardians any power they possess by law, or any part of their authority. On the contrary, I see a manifest intention throughout to preserve existing boards, and no allusion to there being in any instance more than one board in a parish or union. The control given to the Commissioners is abundantly sufficient to secure uniformity of administration by existing bodies, regulated in their election by the provisions of this act. I am not prevented from giving effect to that which I conceive to be the intention of the legislature by the generality of the words in the 39th section, because I find equally general words in another section, the 26th, which must of necessity have a limited construction. I have endeavoured, by a close examination of all the provisions of this act, to discover what the legislature really meant in the 39th section, and I believe that my interpretation of that section is according to their real meaning, bu I feel diffident on the subject, on account of the different opinion which my brother *Williams* entertains. If I am wrong, and if the legislature meant to give this large power to the Commissioners, it is very easy for them to pass an act to that effect which may be clear and unambiguous in its terms. For these reasons I am of opinion that the 39th section, although general in its terms, does not apply to parishes having already a board of guardians or directors under a local act, and that the order of the Commissioners of *April*, 1836, is illegal.

Lord DENMAN, C. J.—The question arises upon section 39, which follows a provision for enabling the Commissioners to direct the rate-payers to proceed to the election of a board of guardians, according to a new right of voting; a provision which applies where several parishes have been united with consent of the Commissioners.

The 39th section extends their power to single parishes, "if the said Commissioners shall, by any order under their hands and seal, direct that the administration of the laws for the relief of the poor *of any single parish* should be governed and administered by a board of guardians, then such board shall

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be elected and constituted for such single parish, in like manner" as the previous section provides for a union.

The order is said to be illegal, because a board of guardians already existed in the parish of *St. Pancras* at the time it was issued. The parish, governed by a vestry appointed under a local act, and having adopted the provisions of the general Vestry Act, is already in the situation in which the order seeks to place it. That which the Commissioners are empowered to effect by their order is done to their hands by two unrepealed acts of parliament. The generality of the enactment is said to be limited by its object. This argument is indeed charged with engrafting upon the act a qualification of its terms, confining them to *such* single parishes as are not governed by local acts; but on general principles of construction, it is contended, that an act which authorises me to change parishes from their present state of things to a new, cannot give that authority in respect to one in which the present state of things is that described as the new. On the other hand, in addition to the very large words that occur in the act, it is urged, that the description of that board which the Commissioners have power by the 38th clause to introduce, is differently constituted from the local board now existing for the parish of *St. Pancras*, and from the juxta-position of the two clauses an intention to confer precisely the same power by both clauses is inferred. In this controversy I am bound to aim at the just construction of this clause, and upon the whole, I think that construction is unfavourable to the present order; for it seems to me, that a restriction of the power to create boards to such parishes as have none, is the natural, if not the necessary import, of the words employed. Suppose, for example, that this Court were invested with the same power, and issued a mandamus to make the election; I apprehend that it would be a good return to say that when the writ was issued, there was a board of guardians within a local act. And however strongly I may surmise the existence of the intention ascribed to the legislature, I do not see how it can be affected without introducing words not to be found in the act; for it would then be necessary to add to those actually employed simply "a board of guardians" some expression equivalent to "constituted in the manner prescribed by section the 38th." Taking the bare words of the act, the purpose is already accomplished.

The clause, however, is by no means so clear and decisive but that it might probably adjust itself to a general object of the act, pervading all its provisions, and manifestly present to the mind of the legislature when the particular enactment was framed. And here uniformity in the management of the poor is said to be the leading object, the spirit and principle of the act, to which the letter of every part must be made subservient.

In answer to this observation I say, that large powers are conferred, and certain means provided to accomplish this general purpose. The Commissioners have a right to issue regulations and orders for the management of every parish, to interfere in all particular cases, and to be present at the meeting of every governing parochial assembly; great securities, no doubt, for one system of management. They are empowered to change the frame and constitution of the managing authorities in the unions mentioned in section 38, and in the single parishes introduced by section 39. That clause may receive full operation, in much more than half the single parishes in the country, though such as have local boards are not included in it; and such

local boards composed of persons trusted by the parishioners at large, and improved by the act which passes under the name of Sir *John Hobhouse*, may have been deemed so fully adequate to all the purposes of the act as to be exempted from that power of alteration by the Commissioners which has been thought necessary in other cases.

We find accordingly several provisions for preserving the powers and constitution of existing bodies. The 41st section, indeed, authorises a complete change by the Commissioners in the mode of appointing and removing guardians for the execution of any local act, and in their number and period of service; but this change cannot be wrought by the Commissioners alone; it cannot be without the consent of the majority of the owners of property and rate-payers of the parish. Here the argument against the present order appears to me very strong; for I cannot discover the necessity for this enactment if the Commissioners possessed the power already to be exercised by the simple declaration of their will.

The preservation of existing authorities by section 54 weighs less with me, because it is declared to be subject to, and saving and excepting the powers granted to the Commissioners, and leaves untouched the question as to the extent of their powers. Yet I think a local board would naturally feel extreme surprise at receiving such an order as that which we are discussing, when they had been told by section 54 that the giving, ordering, and directing relief to the poor of any parish possessing a local board, shall appertain and belong exclusively to the guardians of the poor and select vestry under their own peculiar act. There is a saving of the Commissioners' powers, but that saving would strike any ordinary person as applying to their powers of regulation, control, and interference, which otherwise might have been affected by the extensive words here employed.

If, in the face of these words, it was intended to place the constitution of the board entirely at the disposal of the Commissioners, I think the legislature would and ought to have expressed that design in language open to no doubt or misconception.

Reference was made in the argument to numerous other clauses, many of which have some bearing upon this question, but none that is direct and decisive. They have been observed on by my two learned brothers, with whose opinion I agree, and do not require a more detailed investigation from me.

I cannot conclude without stating, that out of deference to my learned brother, whose views do not coincide with ours, and from feelings of sincere respect to the Commissioners, my brothers *Patteson*, *Coleridge*, and myself, have frequently considered the points involved in the case, and I should have been happy if the result of my opinion had been different; but I am bound to declare it as it is, namely, that the present order cannot be sustained in law.

Rule absolute for a *certiorari*.

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SHAW *v.* ROBBERDS and Others.

Jan. 11*th.*

THIS was an action on a fire policy against the defendants as directors of the *Norwich* Union Fire Insurance Society. The defendants pleaded *non assumpsit*, the action having been commenced before the new rules for pleading came in force. The policy, dated 29th of *March*, 1830, was in the following words:—"1400*l.* on a granary, divided in the middle by a party wall, with a counting-house at the west end, all under one roof; brick and slate. And also a kiln for drying corn in use, attached to the outward walls of the granary and communicating therewith by one door. The kiln is built entirely of brick and iron and tile, except the spars of the roof and inside plastering. 1000*l.* on grain, pulse, seed and utensils in trust, in trade, on commission or his own property in the said divided granary. 100*l.* on a warehouse near, but separate; wood, and covered with pantiles. All in the occupation of the assured, and situate on the Boal near the river *Ouse*, in *Lynn*." By an indorsement on the policy the 1400*l.* was divided into the sums of 1350*l.* on the granary and counting-house, and 50*l.* on the kiln adjoining. The plaintiff's letter of instructions to the Society's agent had described the kiln as a "drying kiln" generally, but the agent thought it right to insert the words, "for drying corn and grain," knowing the plaintiff only as a corn merchant. On the back of the policy, amongst other conditions, were the following:—

"Third, persons insuring will forfeit their right to the sums secured by the policies, unless the buildings insured, or containing the goods insured, be accurately described, the trades carried on therein specified, and the nature of the property correctly stated, so that it may be placed under proper classes and charged at the appropriate rates of premium; and if a building contain any stove or oven used in the process of manufacture, kiln, furnace or steam engine, or any process of fire heat be carried on therein, other than the ordinary risk of common fires in private houses, the same must be noticed in the policy, or it will be void in respect to such building and the goods therein."

"Sixth, If any alteration or addition be made in or to the building or covering of any premises insured or in which any insured property is contained, or the risk of fire to which such building is exposed be by any means increased, or if any furniture or goods be removed into other premises, such alteration, addition, increase of risk or removal, must be immediately notified and allowed by indorsement on the policy, the indorsement being duly made and signed by one of the Society's secretaries or agents, otherwise the insurance as to such buildings or goods will be void."

The cause was tried at the *London* sittings after Trinity Term, 1835, before Lord *Denman*, C. J. It appeared, that on the 11th of *December*, 1832, the plaintiff lent his kiln, which he never used except for drying corn and seed, for the purpose of drying some bark, which had been accidentally sunk in a lighter. He received no remuneration for the use of his kiln on this occasion. When the plaintiff told his kiln-man to dry the bark, the kiln-man said, that he did not understand it; and that he had never seen it done. The kiln-man also told the plaintiff, that the kiln would require to have a cloth spread on the floor to prevent the dust from the bark going through the

(1) A condition in a fire policy that the policy should be forfeited if the buildings were not accurately described, and the trades carried on therein specified, so that they might be classed at appropriate rates of premium, is not broken on account of a change of the business carried on taking place at a period subsequent to the policy being effected.

(2) A condition that if any alteration is made in any building insured, or if the risk of fire to which it is exposed is increased, it must be notified and allowed, is not broken by a kiln for drying corn having been lent, on the single occasion when a fire occurred, for drying bark, which was a more hazardous use, and for which the owner received no remuneration.

(3) Those two conditions together do not amount to a warranty that a kiln described in the policy as a kiln for drying corn should not be used, except for the purpose of drying corn.

(4) The negligence of the insurer himself in drying the bark in the absence of all fraud, is not a defence to an action on the policy.

od so catching fire. The plaintiff told him it did not require one, ered him to light the fire immediately. This was done, and an ordi- was kept up. No notice was given to the insurance office of this use ln. Some bark was then put on to dry, and the next day that bark oved and some more put on. This bark remained on until the time re, which was on the evening of the 13th of *December*. The whole roperty insured was burnt. It appeared by some of the witnesses that , like other kilns for drying corn, had small holes in the flooring on ıe corn was laid, communicating with the lower part where the fire ıt that kilns for drying bark were made with a flue going round the here the bark was laid, and with no holes communicating with the he former kilns were insured at a rate of 3*s. per cent.*, the latter at a *s. 6d. per cent.*

Denman, in leaving the case to the jury, desired them to answer the g questions:—First, whether the drying of corn and the drying of two distinct trades? Secondly, whether the drying of bark as it took re was more hazardous than the drying of corn? Thirdly, whether ıg of this bark produced the loss? The jury answered all three ques- he affirmative. Whereupon Lord *Denman* said, the defendants were to the verdict; but gave leave to the plaintiff to move to set it aside, r a verdict for the plaintiff for the whole sum insured, or any part, ourt might think right. A rule having been obtained to shew cause gly,—

Pollock, Sir *W. Follett*, and *Wightman*, in Michaelmas Term last, ause.—The principle on which a deviation from the voyage renders for a marine insurance void applies to this case. The plaintiff into the contract of insurance on the understanding that the pre- re to be used for a particular business, and having used them for a zardous purpose, this policy becomes void. This policy is also er the third condition indorsed on it, as it has not been properly l so as to be placed under the proper class at the appropriate rate of ı. The kiln was described as a kiln for drying *corn*, while on the when the fire occurred it was used for three days continuously for *ark*, and it was proved at the trial that the rate of premium for kilns the latter purposes was higher. Again, it is void under the sixth ı, even supposing it was properly described under the third, as it is t the risk of fire to which the building was exposed was increased g the bark, and that increase of risk was not notified and allowed. clear from what passed between the plaintiff and his kiln-man, that tiff was guilty of *gross* negligence; against which it is submitted, y did not insure. This is a strong case, as it is an act of gross negli- the plaintiff himself, and not of his servant. The Court cannot enter for the plaintiff without that point having been submitted to a jury.

ttorney General and *Kelly*, *contrà*.—The principle on which a surance becomes void when there has been a deviation is, that the ship a different course from that insured against, and in such cases the equally void, though the voyage made has been a far less hazardous

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one than that insured. It cannot be contended that this policy is void by the third condition, as that applies to the description of the premises at the time the policy is effected. Nor is it void under the sixth, as that relates to any *permanent* alteration whereby the risk is increased, and therefore does not apply to this case where it was a single act of using the kiln for a different object than that mentioned in the policy. Neither is the negligence of the plaintiff any defence to this action. The cases of *Busk* v. *The Royal Exchange Assurance Company* (*a*), *Walker* v. *Maitland* (*b*), *Bishop* v. *Pentland* (*c*), and *Dobson* v. *Sotheby* (*d*), are decisive on that question. Had this action been commenced since the new rules of pleading, the defendants could not have pleaded with any success as a defence to the action either misdescription of the premises as a breach of the third condition, nor the temporary alteration as a breach of the sixth, nor the single act of negligence of the plaintiff. Those defences in the same way will not avail under the general issue in this case.

Cur. adv. vult (*e*).

Lord DENMAN, C. J., this Term (*January* 11th) delivered the judgment of the Court.—This was an action upon a policy of insurance against fire. There were two subjects of insurance of certain buildings including a dwelling-house, and also a kiln for drying corn, attached to the outward wall of the granary, and communicating by one door, built of brick and iron entirely. Both were destroyed by the fire. The policy was subject to the usual conditions; amongst which the third provided, that if there were any misrepresentation in the description of the premises the policy should be void; and the sixth, that if any alteration were made either in the buildings or the business carried on therein, notice should be given to the insurers, an additional premium if required paid, and an indorsement made on the policy, otherwise the policy should be void. It appeared in evidence, that the kiln had been constantly used for the purpose of drying corn only, but that in the year 1832 a vessel laden with bark, having been sunk in the river near the premises and the bark wetted, the plaintiff had allowed the bark to be dried in his kiln as a favour to the owner of it. No notice was given to the insurers; no greater fire than usual had been made; but in the course of drying the bark the kiln took fire. Both the kiln and the other premises were burnt down. The jury found that corn-drying and bark-drying are different trades; that the latter is more dangerous than the former; and that the loss happened from the use of the kiln in drying the bark. A verdict was entered for the defendants, with leave to the plaintiff to move to enter a verdict for him, either for the whole amount of the loss or the value of the kiln. The third and sixth conditions were relied on in argument by the defendants; and it was contended, that the facts here shew, either a misdescription of the kiln within the third condition, or a change of business within the sixth. The two conditions together were also said to amount to a warranty that nothing but corn should ever be dried in the kiln, and what has occurred was likened to a deviation

(*a*) 2 Barn. & Ald. 73.
(*b*) 5 Barn. & Ald. 171.
(*c*) 7 Barn. & Cress. 219.
(*d*) 1 Mood. & Malk. 90.

(*e*) The Court consisted of Lord DENMAN, C. J., PATTESON, WILLIAMS, and COLERIDGE, Justices.

in the case of a marine insurance. It was proved at the trial, that a much higher premium was regularly exacted by insurance offices for a bark kiln than for a malt kiln. The argument, therefore, was, that the premises were not truly described in the policy, or that the trade carried on there had been altered at the time of the fire, without notice to the insurance office. We are, however, of opinion, that neither of the conditions applies to this case. The third condition points to the description of the premises given at the time of insuring, and that description was in this instance perfectly correct. Nothing which occurred afterwards, not even a change of business, could bring the case within that condition which was fully performed when the risk first attached. The sixth condition points at an alteration of business as something permanent and habitual, and if the plaintiff had either dropped his business of corn drying, and taken up that of bark drying, or added the latter to the former, no doubt the case would have been within that condition.

Perhaps if he had made any charge for drying this bark, it might have been a question for the jury, whether he had done so as a matter of business, and whether he had not thereby, although it was the first instance of bark drying, made an alteration in his business within the meaning of that condition. But according to the evidence we are clearly of opinion that no such question arose for the consideration of the jury, and that this single act of kindness was no breach of the sixth condition. The case of *Dobson* v. *Sotheby* was decided by Lord *Tenterden* upon the same principle, and is an authority nearly in point upon this part of the case. No clause in this policy amounts to an express warranty that nothing but corn should ever be dried in the kiln, and there are no facts or rule of legal construction from which an implied warranty can be raised. Neither does the principle on which a deviation puts an end to a marine insurance, viz., that the risk insured against is not the same as that incurred, and that the insured have no right to vary it, apply to the present case. This policy, by the sixth condition, expressly provides for such alterations or deviations as the parties deem material; for the reasons already given we think that the facts of this case do not bring it within that condition; and any thing short of that cannot be considered as an alteration or deviation under this contract. One argument more remains to be noticed, viz., that the loss here arose from the plaintiff's own negligent act, in allowing the kiln to be used for a purpose to which it was not adopted. There is no doubt that one of the objects of insurance against fire is to guard against the negligence of servants and others; and therefore the simple fact of negligence has never been held to constitute a defence; but it is argued, that there is a distinction between the negligence of servants or strangers and that of the assured himself. We do not see any ground for such a distinction, and are of opinion, that in the absence of all fraud the proximate cause of the loss only is to be looked to (*f*). For these reasons we are of opinion that the rule must be made absolute to enter a verdict for the plaintiff for the amount of the whole loss, it having been produced by causes which do not prevent the policy for attaching.

Rule absolute.

(*f*) See also on this point the cases of *Austin* v. *Drewe*, 6 Taunt. 436. 2 Marsh, 130. Holt, 126. 4 Campb. 360. *Tait* v. *Levi*, 14 East, 481; and *Horneyer* v. *Lushington*, 15 East, 46.

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Wednesday, January 11th.

The KING *v.* the Justices of STAFFORDSHIRE.

No person who is not a justice of the peace for the county, has any right to inspect the bills and accounts, &c. which, pursuant to the provisions of stat. 12 Geo. 2. c. 29, s. 8, have been deposited with the clerk of the peace.

A MANDAMUS issued in Easter Term, 1835, addressed to the justices and clerk of the peace for the county of *Stafford*, which after reciting that application, on behalf of certain rate-payers, had been made to inspect and take copies of certain county rates, orders for expenditure, orders of Sessions made thereon, and all accounts, proceedings, and documents relating thereto, &c., bills of costs and disbursements of the clerk of the peace, and that such inspection had been refused, commanded them to permit such rate-payers, and their attorney, to inspect and take copy of such rates, orders, bills, &c.

The return denied a refusal to inspect and take copies of the *rates, orders for expenditure, orders of Sessions*, and all proceedings relating thereto, and set out an order of Sessions for granting an inspection of such proceedings, &c., and further certified that the only accounts or documents in the custody of the justices relating to the rates, were the within-mentioned *bills of the clerk of the peace*, and certain other *accounts and vouchers of the treasurer and high constables* of the said county, all of which had been passed by the justices at Sessions, and all of which had been deposited with the clerk of the peace for the said county, to be kept among the records of the said county, and to be inspected from time to time by the justices according to the form of the statute, and that a true and accurate abstract of the accounts of the receipts and expenditure of the treasurer under their several heads, signed by such justices as audited the same, had been duly published once in every year in a public newspaper, circulated in the said county. Wherefore the justices and the clerk of the peace refused to permit the rate payers to inspect or take copies of the within-mentioned accounts and documents and bills of the clerk of the peace, or any or either of them.

Sir *J. Campbell*, A. G., in Michaelmas Term, a *concilium* having been moved for, argued the case on the part of the Crown.—This is an attempt to overturn the decision of this Court, in the case of *Rex* v. *The Justices of Leicester* (*a*), where a return similar to the present was quashed. The question is, whether the rate-payers are entitled to the privilege of inspection, which that case decided to belong to them. That privilege must extend to the inspection of the bills and accounts, otherwise it would be perfectly nugatory.

The justice's order is for the gross amount expended, and conveys no information of what the amount consists, or even whether the matters contained are within the jurisdiction of the justices. The orders themselves afford no means for ascertaining whether or not they are illegal. Therefore it is impossible to decide whether or not it may be proper to apply for a *certiorari* to remove them. The statute 12 Geo. 2, c. 29, sec. 8, is supposed to afford a ground for resisting this application, by providing that certain documents may be inspected by the justices, but that is only done *ex abundanti cautelâ*, and does not at all take away the common law right of all the rate-payers to inspect. [*Patteson*, J.—The 9th section provides that the order of the justices

(*a*) 4 B. & C. 891.

shall be a discharge to the treasurer in all courts. That perhaps may be a reason for the accounts being inspected.] And the order, though good for his discharge, may still not preclude the rate-payers from inspecting these other documents which they may have an interest in doing, with a view to subsequent proceedings, against the justices. [*Coleridge*, J.—The same act provides (sec. 12), that before making a new rate, three-fourths of the old rate must appear to have been expended; perhaps, therefore, an inspection might be material for the purpose of ascertaining that these three-fourths had not been improperly expended.] The 18th section of 55 G. 3, c. 51, also was introduced, to extend, not limit the information of the rate-payers; still the abstract there ordered would only contain the several heads of expenditure, but would not at all communicate whether the sums were taken out of the county rates rightfully or not. These bills and accounts of disbursements are moreover actually parcel of the justices' order, they are involved in it, referred to by it, and are as much part of it as if recited in it. If an order desire bills marked "A." to be paid, the effect is the same as if they were attached to it or subjoined in a schedule. The permission therefore to inspect the justices' order, implies the permission to inspect such bills. These accounts also are public documents, and the rate-payers, as parties interested, have therefore the right to inspect them; for t may be laid down as a general rule of law, that all documents of a public nature may be inspected by the parties interested (*b*). On this principle it was decided, that every body has a right to inspect the books of the Sessions, *Herbert* v. *Ashburner* (*c*). So in the case of a bishop's register, though the party applied in order to obtain evidence against the bishop himself, *Rex* v. *The Bishop of Ely* (*d*); documents in the hands of the marshal of the Marshalsea, though the applicant was plaintiff in an action against him, *Fox* v. *Jones* (*e*); of parish books, in an action against the churchwardens, without paying the costs of the person attending with the books, *Newell* v. *Simpkin* (*f*). In *Burrell* v. *Nicholson* (*g*), this Court refused to allow a party to inspect them, on the ground that he was not a parishioner, but the Court of Chancery thought otherwise, and ordered their inspection. *Golding* v. *Fenn* (*h*), is to the same effect. Lottery ticket holders may inspect the books and lists of the commissioners, *Schinotti* v. *Bumstead* (*i*). The principle of the common law favours the inspection of all documents; this Court will grant the inspection of a policy of insurance; so of a bill of exchange when perjury is imputed.

Sir *W. W. Follett*, *contrà*.—It is very material to observe the terms used in the mandamus, and in the return to it. The question which arises upon them is, whether after the bills and accounts have been passed at Sessions and deposited with the clerk of the peace, every rate-payer has a right to inspect them. The Attorney-General has relied wholly on *Rex* v. *The Justices of Leicester* (*j*), as to the authority of which the Court expressed great doubts, in *Rex* v. *The Vestrymen of St. Marylebone* (*k*), which was a decision, under a local act, against the right to inspect. *Rex* v. *The Justices of*

(*b*) Tidd, 9th Ed. 593.
(*c*) 1 Wils. 297.
(*d*) 8 B. & C. 112.
(*e*) 7 B. & C. 732.
(*f*) 6 Bing. 565.
(*g*) 3 B. & Ad. 649.
(*h*) 7 B. & C. 765; but not reported as to that point.
(*i*) 1 Tidd, 594.
(*j*) 4 B. & C. 891.
(*k*) 6 N. & M. 600.

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Leicester (*l*), moreover, does not support this application. The mandamus in that case, as moulded by Lord *Tenterden*, omits "accounts," it commands an inspection of the rates for the last two years, and the orders of the justices. [*Patteson*, J.—"And other proceedings and documents relating thereto."] This is merely the general form, there is no reference to any particular account. Next it must be considered, what power this Court has to order an inspection. It is said that these are public documents, but even if so that is not enough; what interest have these parties to see them? In the case of a borough there is an interest, because parliamentary rights are involved; that is not so with respect to a county. In *Rex* v. *The Vestrymen of Marylebone* (*m*), the party was actually interested, yet an inspection was not granted, because the act gave no right to it. There is no common law right of inspection of such documents, it is from the act of parliament alone which creates the right, that we can learn its character and extent. The 18th section gives it to the justices only, they have the exclusive power of passing the accounts. The 14th section contains a provision authorising a certain part of the rate-payers to inspect accounts, which proves that the legislature never contemplated the inspection by the whole body. This Court will not grant a mandamus to gratify curiosity. In the case of *Rex* v. *Clear* (*n*), the application was refused, because the party had not pointed out any grounds upon which he made it; here the party has explained no object that he has in view, no right that he can exercise if permission to inspect be given him. [Lord *Denman*.—These might have been proper grounds for resisting the first application for the rule. I think we must now assume that a *primâ facie* case has been made out.] It should seem that the parties are not shut out from taking them now, their desire has been to obtain a more solemn decision of the point. Besides, the object of the application ought to be set out in the writ. The case of *Rex* v. *The Justices of Nottingham* (*o*), decided that no rate-payer, not a member of the Court of Quarter Sessions, has a right to interpose in the transaction of the business, by virtue of 4 & 5 Wm. 4, c. 48, yet there the interference being before the accounts were allowed might have had some effect.

The cases cited relative to the inspection of public documents, are not applicable, in *Fox* v. *Jones* (*p*), there was no question whether the public had a right or not; a cause was pending, and application was made on behalf of one of the parties. The same grounds existed for the decisions in the other cases. It has been argued that the bills, &c. are part of the orders, but if that was intended to be relied on, it should have been so stated; such an argument is wholly inconsistent with the mandamus, which does not even say they relate to them, but treats them as separate and distinct documents, so does the return, and also states that an inspection of the orders has been allowed. If the bills then are part of the orders the return is false.

Sir *J. Campbell*, A. G. in reply.—A material part of the mandamus has been disobeyed. The only question therefore is as to the legality of that part. *Rex* v. *The Justices of Leicester* (*q*), was decided by Lord *Tenterden*, assisted by four most able judges; the point and the arguments were the same

(*l*) 4 B. & C. 891.
(*m*) 6 N. & M. 600.
(*n*) 4 B. & C. 899.
(*o*) 3 Ad. & E. 500.
(*p*) 7 B. & C. 732.
(*q*) 4 B. & C. 891.

as in this case. The only alteration in the terms of the rule made by Lord *Tenterden*, was to limit the time to which the mandamus was to apply; the bills and accounts would necessarily be included among the documents relating to the order. It is said that the rate-payers are not interested, that they have nothing to do with the rates but to pay them; but the 21st section of the act studiously preserves the *certiorari*, and in order that the rate-payers may effectively avail themselves of that, it is necessary that the accounts should be inspected. If it were found that there had been an irregular destination of the money, or that three-fourths of an old rate were not expended, an order on being brought before this Court might be quashed before the money was paid over. In *Rex* v. *Clear* (*r*), no grievance was shewn. The return is fallacious, when it says that the inspection of the orders was allowed, all inspection of the accounts having been refused. [*Coleridge*, J.—If the accounts form part of the order, they form *part* of the records, but the act directs them to be kept *among* the records.] An inspection of the orders without the accounts is a useless mockery. *Rex* v. *The Justices of Nottingham* (*s*), has nothing to do with the case. The application was refused, because it was unreasonable to ask for an inspection of the accounts before they became public documents, but the Court intimated that an inspection would be allowed afterwards. In *Rex* v. *The Vestrymen of Marylebone* (*t*), the party did not proceed upon his common law right, and the Court refused him, because the act did not authorise, an inspection. [*Coleridge*, J.—Before 12 Geo. 2, c. 29, it was not necessary to preserve these bills, must we not therefore look to that act to see for what purpose it directs them to be preserved?] [*Patteson*, J.—In *Rex* v. *The Trustees of the Northleach Roads* (*u*), where a local act directed that the books of the trustees should be open to the inspection of all persons, and the general Turnpike Act, without negativing any existing rights, afterwards directed that the books should be open to any of the trustees; the Court held that the latter enactment confined the right to the trustees.] All the financial part of any enactment relative to roads is strictly private, and the right to inspect documents concerning them is created by act of parliament. Here there is a pre-existing right at common law, which cannot be taken away without express negative words. [*Williams*, J.—What is the express grievance you point out?] Any misapplication of the rates is a grievance to the rate-payers, and unless this right to inspect be held to exist, the greatest frauds may be committed with impunity,

Lord DENMAN, C. J., this term (Jan. 11th), delivered the judgment of the Court as follows:—The question in this case arose upon the return made by the justices and the clerk of the peace for the county of Stafford to a mandamus, which commanded them to permit certain rate-payers and their attorney, to inspect and take copies of certain county rates and assessments, and of all orders made for the expenditure thereof, and of the several orders of Sessions made thereon, and of all accounts, proceedings, and documents relating thereto; and also of the several bills of costs and disbursements of the clerk of the peace, comprised in the annual accounts of the said county for the

(*r*) 4 B. & C. 899.
(*s*) 3 Ad. & E. 500.
(*t*) 6 N. & M. 600.
(*u*) 5 B. & Ad. 978.

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year 1833. The return to this writ denied any refusal of permission to inspect and take copies of the matters mentioned in the writ, so far as extended to rates, orders for the expenditure, orders of Sessions made thereon, and all proceedings relating thereto; and it set out a previous order of Sessions for granting inspection of all such proceedings to the attorney for the applicants, and permitting copies thereof to be taken by him. It then concluded as follows: "the only accounts or documents in the custody of us or either of us relating to the said rates or assessments, are the within-mentioned bills of the clerk of the peace, and certain other accounts and vouchers of the treasurer and high constables of the said county, all of which have been passed by us at our respective quarter sessions, and deposited with the clerk of the peace, to be kept among the records, and to be inspected from time to time by us the said justices, according to the form of the statute, &c.; and that a true and accurate abstract of the accounts of the receipts and expenditure of the said treasurer, under the several heads, signed by such of us as audited the same, hath been duly published, &c., wherefore we have refused, &c."

This return raises the question, whether the rate-payers of any parish within a county have, as such, any right to inspect and copy the bills of charges of county officers, which having been paid by the treasurer, under orders of justices, have become items in his account, and then having been passed at Sessions, and he having been discharged by order of Sessions, have been deposited by the clerk of the peace among the county records in pursuance of the 12 Geo. 2, c. 29, s. 8.

The existence of such right was contended for principally on three grounds; 1st, upon the authority of *Rex* v. *The Justices of Leicester* (*v*); 2nd, because the bills in question were parcel of the orders in virtue of which they were paid, of which the inspection was conceded, but that such inspection was wholly nugatory, unless it extended to the bills also; 3rd, because the bills were public documents, which by the common law every one interested in them had a right to see; and that the provisions relative thereto, in the 12 Geo. 2, c. 29, and 55 Geo. 3, c. 51, were either collateral to, or in affirmance of, and certainly did not abridge this right.

Prior to the passing of the 12 Geo. 2, c. 29, the justices in Sessions were authorised by several acts of parliament to raise rates applicable to specific purposes. By that act one general rate applicable to all those purposes and for such sum as the justices shall think necessary, is directed to be from time to time assessed and collected. The monies are to be received by the treasurer, who is appointed by them, and paid according to their orders for any use or purpose to which the public stock of the county is by law applicable, and no new rate is to be made until the justices are satisfied that three-fourths of the money collected by the preceding rate have been so expended. The treasurer is to keep books and accounts of his receipts and payments, distinguishing the particular uses to which the payments have been applied, and these, with the vouchers, he is to lay before the justices at Sessions; and after they have been there passed, both are to be deposited with the clerk of the peace, who is required to keep them among the records of the county, "to be inspected from time to time by any of the said justices within the limits of their commissions, as occasion shall require, without fee or reward." When

(*v*) 4 B. & C. 891.

the justices have passed the accounts, their discharge by order of Sessions is to be allowed as a sufficient acquittance to the treasurer, in any court of law or equity, to all intents and purposes whatsoever. A limited appeal to Sessions is given against the proportions of the rate, but not against the rate itself; and, finally, the jurisdiction of this Court is restrained within certain limits, by the 21st section, as to the removal into it by *certiorari* of any rate or orders of proceedings at Sessions relating thereto. This act was amended by the 55 Geo. 3, c. 51, the principal object of which was to provide for the due proportioning of the rate on the several parishes; but by the 18th section, the treasurer is required, once in every year, to publish in some one of the county newspapers, a true and accurate abstract of his account under its several heads, signed by the justices who shall have audited the same. These are the provisions of the statutes material to the present question, which we have stated thus at length, because they appear to us to furnish very cogent inferences as to the right now in dispute. No one can read the clauses without being satisfied that, subject to the limitations specified, the legislature has placed the whole control as to the imposition and expenditure of the county rate in the court of quarter sessions; and with regard to the particular matter of publicity, they provide specifically for the preservation of the vouchers, and for their inspection by a particular class, the members, namely, of the court, which controls the expenditure; and provide also for information to be conveyed to the rate-payers in general, by the annual publication of the receipts and payments, in such a form as was deemed sufficient for the purpose. This latter provision may perhaps throw some light upon the construction which the former ought to receive; but looking at the former by itself it is difficult to understand why a specific provision should have been made for the inspection by the justices without fee or reward, if, by the common law, the same right (and it is that same right which is now claimed) existed in favour of every rate-payer. It is remarkable moreover, that in the same statute, 12 Geo. 2, c. 29, s. 14, respecting the repairs of public bridges, banks, &c., a similar provision is made for the preservation and deposit of contracts for the repairs; and as to these the purpose is declared to be the inspection, not only by the justices but by any person employed by any parish, township, or place contributing to the purposes of the act. The difference in the two clauses can hardly be conceived to have been unintentional.

It is also material to observe, that the duty of preserving the vouchers appears to have been first created by the 12th Geo. 2, c. 29. Upon examination of all the statutes recited in the preamble, no such enactment appears among them, though the provision for the absolute discharge of the treasurer by the acquittance of the justices is copied from one of them, the 11 & 12 Will. 3, c. 19, s. 2. Independently of the statute we know of no direct obligation on the justices to preserve the vouchers of audited accounts, however prudent such a preservation might be; nor do we know of any thing which should make it compulsory on the clerk of the peace to receive such documents and preserve them among the county records. If this be so, and the statute which first directs their preservation and place of deposit, defines also the purpose of such preservation, and the persons who are to have access to them, what right can others have to inspect them for other undefined purposes? We are of opinion, therefore, upon a review of the provisions of the

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statutes, that they raise a direct inference against the existence of any such right.

It is fitting, however, to consider the weight of the argument independently of these provisions. It is alleged that these are public documents, and that every one having an interest in them has therefore a right to inspect them. It is not necessary to inquire whether these are, strictly speaking, public documents; and though most of the cases cited on this point were examples of the exercise of a power by the Court to compel one of two litigating parties to make reasonable disclosures to the other, we are by no means disposed to narrow our own authority to enforce by *mandamus* the production of every document of a public nature, in which any one of the King's subjects can prove himself to be interested. For such persons, indeed, every officer appointed by law to keep the records ought to deem himself for that purpose a trustee. But the difficulty is, to see that the present applicants have such an interest as brings them within the rule.

During the argument we inquired what interest in the applicants was relied on as entitling them to the inspection? In answer it was conceded, that the rate-payers had no direct interest in ascertaining the expenditure of the by-gone rate, because, even if discovered to be illegal, the monies paid by the treasurer could not be recovered from him; and it is obvious that they could not be recovered from the parties to whom they had been paid, nor from the individual justices who had sanctioned the payments. But it was said, that as the justices at Sessions were prohibited from imposing a new rate until three-fourths of the former had been lawfully expended, the rate-payers were interested in ascertaining the nature of such expenditure, to enable them to oppose the imposition of a new rate. The answer to this is, that the rate-payers, as such, cannot by law interfere in the matter.

Let it be assumed, that the inspection prayed for should disclose an illegal expenditure of a former rate, or the fact that more than one-fourth of the former rate still remained unexpended in the treasurer's hands, still no rate-payer as such could be heard in the Court of Quarter Sessions to object to the imposition of a new rate; *Rex* v. *The Justices of Nottingham* (*x*). The subject-matter is not one which the rate-payer can bring before the Court as a litigant, nor is he as such a member of the Court. The utmost, therefore, that can be said on the ground of interest is, that the applicants have a rational curiosity to gratify by this inspection, or that they may hereby ascertain facts useful to them in advancing some ulterior measure in contemplation, as to regulating county expenditure: but this is merely an interest in obtaining information on the general subject, and would furnish an equally good reason for permitting inspection of the records of any other county. There is not that direct and tangible interest which is necessary to bring them within the rule on which the Court acts in granting inspection of public documents.

But it is contended that these vouchers were substantially parcel of the orders which relate to them. But what in truth is the form of the orders, and whether the vouchers are, or are not, by any reference or otherwise, so incorporated with them as to become parcel of them, is not disclosed either in the writ or return. The applicants, prior to the date of the writ, had a full opportunity of inspecting the orders; it is therefore their fault that we

(*x*) 3 Ad. & E. 500.

have not this information, the language of their own writ raises a presumption against them, and there is every reason to suppose that in truth the orders are perfect instruments without the vouchers.

Lastly, however, we are strongly pressed with authority of *Rex* v. *The Justices of Leicester* (*y*), in which Lord *Tenterden* and this Court made a rule absolute in the very terms of the present. The great authority attached to that decision rendered it necessary for us to grant the writ and see what return should be made, that the principles on which it rested might undergo the most deliberate revision. We cannot adopt the argument urged at the bar by which that case was sought to be distinguished from this; because though the refusal of the justices there was too extensive, and the return therefore properly quashed, the Court obviously intended to decide the present question also. After much consideration, we think in that respect it cannot be supported. It is observable, that although the material arguments at the bar against the *mandamus* received no answer from the other side, and that no reason is stated for the judgment of the Court, yet it appears that no argument was permitted upon the return. Our Brother *Littledale*, who was a member of the Court at the time, permits us to say that he disapproves of that case.

Upon the whole, we conclude that this return is sufficient in law. Much has been said upon the practical irresponsibility which our decision may occasion as to the expenditure of the county rate by the justices. If this consequence really flowed from our refusal of the writ, that would be no reason with us for straining the law to prevent it. The law must be altered by the proper authority, if too much discretion is now vested in the Court of Quarter Sessions. But in truth, considering the number of the magistracy in every county, the large attendance usual on the days of transacting the county business, that the Court in which it is transacted is an open Court, that all these accounts are there publicly considered, and an abstract of the whole expenditure afterwards publicly circulated, and that the law is most explicit as to the matters to which the county rate is applicable; it appears to us very unreasonable to apprehend any evil consequences from holding that the magistrates are not compellable to grant to rate-payers generally this inspection.

If any abuse exist, it can hardly be supposed that among so many no one magistrate will be found to bring the order before this Court; and the law has given already to him every advantage which the granting of a peremptory *mandamus* would afford to the present applicants. On the other hand, no slight inconvenience might result from holding that in every county all its thousands of rate-payers, with no interest and without fee or reward, have a right to the inspection now contended for; nor can we believe that such a power would have been given by doubtful implications. We disclaim, however, the being influenced on either side by these considerations, and have attended only to the legal principles, which appear to us applicable in pronouncing that this return is sufficient.

Peremptory *mandamus* refused.

(*y*) 4 B. & C. 891.

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Friday, Jan. 20.

DOE, dem. READ, *v.* HARRIS.

A testator threw his will into the fire for the purpose of destroying it. The envelope inclosing it was singed, but before the will itself could receive any injury it was rescued by the defendant (a devisee under the will) who led the testator to believe it had been destroyed. The testator thereupon expressed his satisfaction, and said he would make another will:—*Held*, as there was no burning of any part of the will itself, that no act had been done within the meaning of the statute of frauds to effect its revocation; and that the circumstance of the attempt to revoke it having been frustrated by the defendant herself made no difference.

2. Misdirection upon one point is a good ground for a new trial, although the jury may have rightfully found their verdict upon another point as to which there was no misdirection.

EJECTMENT for messuages, &c. Plea, not guilty. At the trial, before *Patteson*, J., at the summer assizes in 1835, for the county of *Glamorgan*, it was admitted that the lessor for the plaintiff, as the heir of *John Read*, was entitled to recover, unless the defendant could establish the will under which she claimed. The will was duly executed. At the trial there were two questions: first, as to the validity of the will; second, as to whether or not it had been revoked. As to the second, it was proved by a witness that the defendant had stated to her that the testator had desired the defendant to fetch his will, which was enclosed in an envelope; and that he had thrown it into the fire, from which the defendant had rescued it, that the envelope was singed, that there had been a great quarrel between them, and in the evening after the dispute the defendant told the testator she had burnt the will, upon which the testator said that it should not be his will, and that he would go to *London* and make another. The will was produced at the trial, and bore no mark of fire. The envelope was not produced. The learned judge told the jury that if they believed the witness they ought to find for the plaintiff, because the facts stated by her amounted, in his opinion, to a revocation of the will. There was also evidence to shew that the will had been made in consequence of undue influence exercised upon the testator by the defendant. The jury found a verdict for the plaintiff.

Evans having obtained a rule for a new trial, on the ground of misdirection,

Chilton and *W. M. James* now shewed cause. They first argued that, as the jury might have found for the plaintiff on the ground that undue influence was exercised, the rule must be discharged. [Lord DENMAN.—If evidence has been received, which is not admissible, a verdict in favour of the party by whom such evidence has been given cannot stand, although other evidence may have been given on which the jury may have founded their verdict. So it is if a judge has misdirected the jury as to one point, although he may have left other parts of the case to them correctly, on which alone their decision may have proceeded.] The case of *Bibb* v. *Thomas* (*a*), is precisely parallel with this in all its points, nothing was there proved which was not proved in the present case, and that case has never been doubted; that case shews that the slightest singing is sufficient. Here it was proved by the admission of the defendant, who was an eye-witness, that the envelope was singed. That must be considered as part of the will, if not, a different inference must be drawn, in different cases, according to the thickness of the envelope, though the intention and the acts done by the testator were the same in all. In some cases the outside sheet of a will is without writing upon it. Suppose such a will itself without an envelope were thrown into the fire and the outside sheet alone burnt, will it be argued that that does not amount to a revocation, because the written part remains unburnt? In *Bibb* v. *Thomas*

(*a*) 2 W. Black. 1043.

there is nothing to shew that the part burnt was written upon. All that the statute requires is, that the intention of the testator should be evidenced by some act, the only outward sign necessary is the throwing into the fire. In *Doe* v. *Perkes* (*b*), the doctrine of *Bibb* v. *Thomas* (*c*) is recognised to its fullest extent. Suppose a will perfectly executed as to real property, to which a codicil was afterwards attached, and the testator afterwards threw that will on the fire, would it be held that the will was not revoked because the codicil alone was burnt, leaving the rest of the will untouched? or suppose a will had been obliterated by ink, which had afterwards been removed. [PATTESON, J.—There the act of revocation would have been completed.] A will may have been made in duplicate, and only one part of it been burnt. In *Miss Blandy's* case (*d*) it was proved, that she put a letter into the fire, and afterwards coals were thrown on, which had the effect of preserving the letter, could it be argued that under such circumstances a will had not been revoked? In *Bibb* v. *Thomas* the act of the testator was not complete. Here it is quite clear that the act was done *animo revocandi*; the intention was quite clear, and only prevented from being fully carried into effect by the fraud of the devisee; the testator was afterwards informed by her that that act had been completed, and expressed satisfaction, and his continuance in his intention to revoke the will.

Evans and *V. Williams*, *contrà*, were stopped by the Court.

Lord DENMAN, C. J.—It ought always to be considered that a will is the most solemn instrument that can be executed. The statute requires certain forms to be observed in the execution, and with regard to the revocation, it enacts that the intention to revoke a will so executed must clearly appear, and that one of certain acts is necessary to effectuate that intention. Here there is no evidence that any one of those necessary acts was done. It is impossible to contend that burning the cover of a will is burning the will itself: that would be a contradiction in terms, and make void the statute which prescribes certain palpable and visible acts to be done to the will. Cases may be put in which these acts may have been imperfectly and slightly done, but no inferences can be drawn from them in favour of Mr. *Chilton's* argument for dispensing in any case with the act itself, because the object of the statute was to preclude the doubts and uncertainty which exist in such cases. Two cases have been cited: in *Bibb* v. *Thomas* (*c*) the Court were of opinion that the party had done two acts, either of which would have satisfied the statute. Possibly if the matter were now brought before the Court for the first time, doubts might be entertained; but the case shews that the Court thought that both of the acts were in fact done to bring the case within the statute. That case does not at all shew that the Court dispensed with either act in consequence of the conduct of any party other than the testator. In the case of *Doe* v. *Perkes* (*b*) the party was in the act of tearing his will with the intent to cancel it. He tore it twice through, and then one of the parties present prevented him from proceeding further: an apology was offered by the devisee and accepted. The testator put the will into his pocket, and afterwards expressed his satisfaction that no

(*b*) 3 B. & A. 489.
(*c*) 2 W. Black. 1043.
(*d*) 18 State Trials, 1149.

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material part of the writing had been injured. I think that the decision of the Court was right, because the testator there submitted to be stopped before he had completed his purpose: he appeared to have revoked his revocation. I think therefore it was correctly left to the jury to say whether the intention of the testator was completed or not. But neither of those cases approaches the present; it would be a violence to the language of the statute to hold that there were any circumstances here to go to the jury as evidence of a revocation. On the other side no inconvenience can result from saying that a party, if he persist in his intention to revoke his will, shall do so by an instrument attested by proper witnesses, or by some one of those acts which the statute prescribes. I think we were bound to say this promptly and decidedly, both because we feel no doubt, and because of the importance of the principle which we support.

PATTESON, J.—I am entirely of the same opinion. I think that I left the case incorrectly to the jury. When *Bibb* v. *Thomas* was quoted I saw no difference between that and the present case. I told the jury that if they were satisfied as to the truth of the statement made by the witness, that the circumstances amounted to a revocation; but I now think that I was wrong. That case was different from the present; there was a tearing as well as a burning; the case finds that the testator opened the will, and ripped it so as almost to tear a piece off. That is quite different from the present case; there it was quite clear that the act had been done, because the tear appeared on producing the will, not that I think the production important as a mode of proof, but I think it quite necessary that the act should have been done. The statute says that there must be a burning, tearing, or obliterating of the instrument. I think we should do great violence to its language if we construed that to mean an attempt only to do those acts. Such a construction would create inconvenience upon inconvenience. I think therefore there was no evidence to be left to the jury of burning. It is quite necessary that there must be an actual burning of the paper where the case turns upon burning. Here there was no actual burning proved. I think therefore I was wrong in the manner in which I left the case to the jury.

WILLIAMS, J.—I am of the same opinion. In the construction of the act we ought to provide for the ordinary cases, not those of singular occurrence. It has been contended that if a testator puts his will into the fire with intention to revoke it, that the revocation is carried into effect, even although the will be taken out by some other person before the fire has acted upon it, provided that person has done so fraudulently and against the consent of the testator, because otherwise this Court would be forwarding that fraudulent act. But on that principle if the testator had sent a messenger to burn it, and the messenger had not done so, still the revocation would have been complete. Thus we should be driven into receiving parol evidence precisely where the object of the act was to exclude it. I do not pretend to determine what extent of consumption is necessary, but it is quite clear that there must be an actual burning, and it appears to me that nothing was done in that respect to satisfy the language of the act.

Mr. JUSTICE COLERIDGE.—If we were to adopt the argument which has

een submitted to the Court to day we should be laying a foundation, step by tep, for repealing the statute of frauds, as far as regards this subject matter. That statute, for very wise purposes, has determined that the validity of a will, r the revocation of a will, shall not stand on mere intention; but it has equired the party in either case to do certain definite acts. A valid devise annot be accomplished without the signature of the party, nor without he attestation of three witnesses: no intention however strong to have signed t, no explanation why the signature was not there, no intention to have the witnesses to attest it, no explanation why they were withheld, is sufficient. That is the rule with regard to making wills. When a will is once made the same strict rules must apply with regard to its destruction; and therefore I apprehend there must at all events be some act done, coupled with the intention to revoke at the time, in order to satisfy the sixth section of the Act. We have been pressed with this difficulty: must the whole document, in the case of burning, be destroyed? or, in the case of an obliteration, must the whole document be obliterated? It is hardly necessary in this case to answer the question. I should say it is not necessary that the whole instrument should be destroyed, but at all events there must be such an injury by burning with the intent to revoke as destroys the entirety of the will, because if any part of the will has actually been burnt by the testator with the intention to revoke, the words of the statute are satisfied, such a will no longer exists in the way in which it was originally framed by the testator. In this case, however, nothing at all was done to the will; there was an intention on the part of the testator at the moment to burn it, but the fire never actually touched the will; the only ground on which it can be put is, that the burning was prevented by the fraud of the devisee; that the testator did all that in him lay; that he did an act the natural consequence of which is burning, and that that consequence was only prevented by the fraud of the devisee. Will that principle hold in regard to other parts of the same section? Suppose the party had intended to revoke the will by writing, and he had been prevented by fraud from signing the instrument of revocation, or by fraud the necessary witnesses had been prevented from attesting the execution of that instrument of revocation, could it have been said, because the testator had done all that in him lay, that therefore the act of revocation was complete? I apprehend not; the safest rule, and the rule we are bound to adhere to, is to take the words of the statute and carry them into effect according to that construction which common sense and legal reasoning would bestow on them.

Rule absolute.

SILVERY *v.* HOWARD.

Monday, Jan. 23.

ASSUMPSIT on an agreement to make a good title for certain lands tried at *Norwich*, before Lord *Abinger*, C. B., at the *Lent* Assizes, 1835.

A testator after bequeathing several pecuniary legacies, devised as follows:—"I do hereby give and devise unto W. L. and A. his wife, for and during their natural lives, all and every my messuages, lands, tenements, hereditaments and premises whatsoever in the city of *Norwich*, or elsewhere, in the kingdom of *Great Britain*. And from and after the decease of the said W. L. and A. his wife, my mind and will is, the said messuages, lands and tenements, hereditaments, and premises, shall be equally divided unto and amongst such of the children of the said W. L. and A. his wife as shall be then living, share and share alike." There was a residuary clause as to personal, but none as to real property:—*Held*, that the children took life estates only.

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Verdict for the plaintiff, with leave to move to set it aside and enter a verdict for the defendant, in case the Court should think that an estate in fee passed under a will the material parts of which were as follows:—

"This is the last will of me, *John Lamb Love*, butcher of *Norwich*. First, I appoint *William Lamb* and *Henry Taylor* executors. I give and bequeath unto *Sarah*, the wife of *J. P.*, the interest of 200*l.* during her natural life. I give and bequeath the principal sum of 200*l.* equally between my said executors (various pecuniary bequests similarly worded then followed, to be paid as soon as convenient after the testator's decease). "And I do hereby give and devise unto the said *W. L.* and *Ann* his wife, for and during their natural lives, all and every my messuages, lands, and tenements, hereditaments and premises whatsoever, in the city of *Norwich*, or elsewhere in the kingdom of *Great Britain*. And from and after the decease of the said *W. L.* and *A.* his wife, my mind and will is, *the said messuages, lands, and tenements, hereditaments and premises, shall be equally divided unto and amongst such of the children of the said W. L. and A. his wife as shall then be living, share and share alike;* and as to what shall remain of all and every my personal estate not hereinbefore disposed of, after the payment of such just debts as I shall owe at the time of my decease, my funeral expenses, charges of probate of this will, and other charges incident thereto, and to the executorship thereof, my mind and will is, and I do hereby give and bequeath such remainder or overplus unto my said executors, *W. L.* and *H. T.* And lastly, hereby revoking all former wills by me made, I declare this only to be my last will and testament. In witness, &c.

"JOHN LAMB LOVE."

A rule *nisi* having been obtained accordingly by *Biggs Andrews* in *Easter* Term, 1835,

Storks, Serjt. and *Palmer* now shewed cause. An estate for life only passed. It must be admitted by the other side that there are no formal words giving an estate in fee, neither are there found in this will those other circumstances and expressions, from which the Courts have inferred the intention to give such an estate. There is no charge upon the property, nor does the word estate occur, which has sometimes been held *ex vi termini* to pass the fee, *Den* v. *Mellor* (*a*). In that case, and in *Doe* v. *Allen* (*b*), Lord *Kenyon*, C. J., regrets that the same strict words have not been required in dispositions of land by will, as in those by deed. The words "hereditaments," "tenements," have no such legal effect as the word "estate," and in some cases even the latter word has been held not to pass the fee where there were no formal words of limitation, *Roe* v. *Holmes* (*c*), *Den* v. *Gaskin* (*d*), *Goodright* v. *Patch* (*e*), *Roe* v. *Blacket* (*f*), *Morgan* v. *Griffith* (*f*), are to the same effect. Assuming then that the words of description are not large enough to carry an estate in fee, the question is, whether the direction of the testator that the lands should be equally divided among the children, share and share alike, has that effect? And the

(*a*) 5 T. R. 561.
(*b*) 8 T. R. 497.
(*c*) 2 Wils. 80.
(*d*) Cowp. 657.
(*e*) Loft. 224.
(*f*) Cowp. 235.

f *Doe* v. *Tucker* (*h*), is a decisive authority that it has not. There ry same words occur; there was also a specific devise ("my freehold called *Pouncetts*"), yet the Court, without hearing the conclusion of gument, held that an estate for life only passed. The intention also of stator to pass a fee was admitted by *Parke*, J., but the words being as of themselves would not carry one, it was disregarded. The cases will be cited on the other side are *Roe* v. *Wright* (*i*), *Chichester* v. en (*j*), *Randall* v. *Tuchin* (*k*); but in all of those the testator em- the word "estate."

gs, *Andrews*, *contrà*.—In *Andrew* v. *Southouse* (*l*), Lord *Kenyon* t has been the wish of the Courts for nearly half a century to give to the intention of the devisor. They are always anxious to put the onstruction as judges upon a case which they would do if called upon de as individuals. And therefore if an authority can be produced in of such construction they always follow it. And there does exist the ity of a case perfectly analogous to the present in favour of such uction as will effectuate the intention of the testator. In this will, ppointing the executors, the testator proceeds to dispose of his personal ty; he then devises his real estates, and in doing so he uses precisely me expressions which he before employed in the disposition of his alty. The property in question consists of messuages, which have resemblance to personal property, being of a wasting nature. He roceeds to bequeath all the residue of his personal property, which that he thought he had already devised all his interest in his real ty. The devise also contemplates a division of the property among jects of his bounty, and a division of such a nature as could only be d by a sale and a partition of the purchase money. With the ex- n of the case of *Doe* v. *Tucker* (*h*), no case presses against the uction contended for, because in all of them the terms used are nt from the present. In *Baddeley* v. *Leppingwell* (*m*), Mr. Justice ot comes to the conclusion that a fee passed merely by the omission of ords, limiting the estate to one for life, such words having been yed by the testator in a previous devise. Such also was the conclusion d at by the Court in *Gall* v. *Esdaile* (*n*), and on the same grounds. was also a residuary clause in the latter case. But the case which is the e this in terms, and which was not brought forward in *Doe* v. *Tucker* (*h*), tes v. *Brydon* (*o*), and the Court must overrule that case if they that an estate in fee did not pass by the words of this will. There vise was of a house and stable unto the children of the testatrix's s, *share and share alike*, and if *S. W.* were not living at a certain the house and stable *to be divided amongst* such children. The Court on the circumstances of the property being of a perishable nature, and direction to divide, as sufficient by shewing an intention, to pass the Both those circumstances occur here. In that case there was a

3 B & Ad. 473.
7 East, 259.
4 Taunt. 176.
6 Taunt. 410.

(*l*) 5 T. R. 292.
(*m*) 3 Bur. 1533.
(*n*) 8 Bing. 323.
(*o*) 3 Bur. 1895.

residuary clause, disposing of all the rest of the estate, which would have prevented any part of the property from remaining undisposed of. There is no such clause here, and if the words are held not to pass a fee, the testator, contrary to his manifest intention, will be intestate as to some part of his property. In *Stewart* v. *Garnett* (*p*), the Court held that the words "one moiety of the rents, issues, and profits of my estate, named in the parish *M. to be divided equally among my grandchildren*, the other moiety of the rents, &c. I give to *R.* and his heirs," passed a fee; there is nothing in the words of that devise to authorise such a construction, which is not found in this case.

Cur. adv. vult.

Lord DENMAN, C. J., now delivered the judgment of the Court. This was a question whether by a devise of land to children, share and share alike, an estate passed for life, or in fee. It has been held repeatedly and particularly in a late case of *Doe* v. *Tucker* (*q*), that such words, uncontrolled by clear proof of an opposite intention in other parts of the will, carry an estate for life only. The cases cited against the application of the rule all admit of satisfactory distinction from the present. *Baddeley* v. *Leppingwell* (*r*) was decided on the creation of a charge. *Gall* v. *Esdaile* (*s*), *Stewart* v. *Garnett* (*p*), on the peculiar force of the word *estate*. One case, however, was mentioned, *Oates* v. *Brydon* (*t*), which was not noticed by the learned counsel who opposed the doctrine in the argument on the present case, nor in that of *Doe* v. *Tucker* (*q*). That was a devise of a house and stable, for the life of testatrix's husband; and after his death to her brother for life; afterwards "to the children of my cousins *B.* and *W.*, share and share alike," and if the brother should not be living at the time of the husband's death, then my mind and will is, that the said house and stable, with the appurtenances, be divided amongst the said children of *B.* and *W.* as aforesaid." Lord *Mansfield* and the Court were there of opinion that there was enough on the whole will to shew intention that the value of the house and stable should be divided among the seven children; and the defendant, a purchaser from them, had the *postea* delivered to him. This decision would be the more likely to escape notice, both on this and on former occasions, because the principal point in it turns on the effect of confessing lease, entry, and ouster, and the question of estate is not mentioned in the margin, nor does Sir *James Burrow's* statement of the case appear very satisfactory, the editor in 1812, making no less than three necessary corrections in the course of a single page. Lord *Mansfield* also commences his judgment on this point of construction by observing that the whole property was worth but 100*l.*; which low value of property of a wasting nature to be divided among seven children, after two lives, led the Court to think that it must have been meant to be sold and the produce divided. The result was, that upon the whole of that will there was enough to shew that the testatrix intended the value of the house and stable to be divided among the children. It seems unnecessary

(*p*) 3 Simons, 398.
(*q*) 3 B & Ad. 473
(*r*) 3 Bur. 1533.
(*s*) 8 Bing. 323.
(*t*) 3 Bur. 1895.

for us to say more on the present will than that we find no words in it which clearly convince us that the testator intended to pass a fee; the ordinary rule, therefore, must prevail by which a clause so worded is deemed to carry a life estate only.

Rule discharged.

DOE, d. JOHN PRATT, *v.* WILLIAM PRATT and others.

Jan. 16.

The following devise: "I appoint A. B. my whole and sole executor of all my houses and lands, situate at F." :—*Held*, to give a fee-simple.

THIS was an action of ejectment tried before *Parke*, B., at the *Yorkshire* Spring Assizes, 1835, to recover lands at *Flixton*, in the county of *York*. The lessor of the plaintiff, *John Pratt*, claimed as heir at law of *Thomas Pratt*, and the defendant *William Pratt*, as his executor and devisee under a will of which the following is a copy: "In the name of God, Amen. I, *Thomas Pratt*, of *Flixton*, in the county of *York*, labourer, being in health of body, and of a sound and disposing mind, memory, and understanding, praised be God for the same, do make this my last will and testament in manner and form following: First, I will that all my debts and funeral expenses be paid and discharged by my executor hereinafter named; I then give and devise to my sister *Alice Hall*, widow to *William Hall Hambro'*, the sum of 2*l.* 10*s.* annually for each year during the term of her natural life: also to my niece *Ann Pratt*, the sum of 2*l.* 10*s.* annually during the term of her natural life: also, I give unto my nephew *John Pratt*, the sum of *five* shillings, to be paid at the end of twelve months after my decease. *I appoint my nephew William Pratt my whole and sole executor of all my houses and lands* situate at *Flixton*, in the county of *York*. This being my last will and testament, I have herein set my hand and seal, this ninth day of *August*, 1830.

"THOMAS PRATT."

It was admitted at the trial that the testator was at the time of his decease, and for twenty years and upwards immediately preceding thereto, seised in fee of the property sought to be recovered; that the will was duly executed, and the testator in a competent state of mind, and that the *John Pratt* (to whom in the will there is a bequest of 5*s.*) is the lessor of the plaintiff, and heir at law to the testator. The learned judge at the trial directed a verdict to be entered for the plaintiff, with leave for the defendants to move to set aside the verdict, and enter one for the defendants instead. A rule *nisi* having been obtained accordingly,

R. Alexander and *Wightman*, in *Michaelmas* Term last, shewed cause (*a*). The lessor of the plaintiff contends that, by the words appointing the defendant whole and sole executor of the testator's houses and lands, no interest in them is given to him. If any interest passes, there is no doubt it must be a fee-simple. It is submitted that the Court will always construe with strictness wills which disinherit the heir at law. The case of *Piggott* v. *Penrice*

(*a*) Cor. Lord *Denman*, C. J., *Patteson*, *Williams*, and *Coleridge*, Js.

King's Bench.

Doe, d. Pratt, v. Pratt.

(*b*) is a distinct authority to shew that under this devise the land will not pass to the defendant. The devise in that case was very similar to the present. The case of *Clements* v. *Cassye* (*c*) is also a strong authority to the same effect. [Lord Denman, C. J.—In that case *expressio unius fuit exclusio alterius.*] In *Com. Dig.*, *Devise* N. 3, a case is cited which also is similar to the present, where it was held that the land did not pass. The case in *Roll's Abr. Devise*, N. 1, is also expressly in point to shew that the fee will not pass by this devise. The case of *Shaw* v. *Bull* (*d*) is also to the same effect. [Coleridge, J.—What meaning do you give to the expression "whole and sole executor of all my houses and lands?"]—That may mean, as in the case of *Piggott* v. *Penrice*, that the executor was to receive the rents in arrear. [Patteson, J.—Those would go to the executor without any express mention of the lands.]—The cases quoted, it is submitted, shew that no interest in the land passed by the words of this devise alone to *William Pratt*, and that therefore the property is undisposed of, and goes to the heir at law, the lessor of the plaintiff. The other parts of the will do not affect this question. By the first clause the executor is ordered to pay the debts and funeral expenses, but then they are not charged on the real estate, so that it is not necessary to suppose that the testator intended to devise the land to the executor for this purpose. The judgment of Lord *Abinger*, in the case of *Doe*, d. *Ashby*, v. *Baines* (*e*), shews that unless there is a condition imposed on an executor requiring it, the Court will not construe words as carrying more than such an estate as they in themselves imply. The next clauses in the will give two annuities, but they in the same way are not charged on the realty, and in the case of *Hume* v. *Edwards* (*f*) it was decided that such annuities are to be considered in the same light as other pecuniary legacies. So in the case of *Davies* v. *Wattier* (*g*) a fund was set apart for the payment of an annuity chargeable on the personalty, and, on that fund becoming insufficient, the Court directed that another part of the personalty should supply the deficiency, shewing thereby that the annuities were on the same footing as the rest of the legacies. It is moreover observable that this will does not direct the executor to pay those annuities. Next comes a gift to the heir of 5*s.*, but a number of cases might be cited to shew that a gift of that kind to the heir does not warrant the construction that the testator's intention was to disinherit him. That is laid down in the case of *Denn*, d. *Gaskin*, v. *Gaskin* (*h*). The only remaining clause in the will is that first considered.

The case of *Doe*, dem. *Gillard*, v. *Gillard* (*i*), will be quoted on the other side, but in that case the testator had charged his real estates with the payment of his debts and legacies, and it was necessary to construe the will as the Court did in order to effectuate the intention of the testator. The same observation is applicable to the case of *Anthony* v. *Rees* (*j*). So also in *Loveacres* v. *Blight* (*k*) it was necessary that the executor should take a fee, but in this case the debts and funeral expenses and annuities are chargeable on the personalty only.

(*b*) Pric. Chan. 471. Com. Rep. 250. Gibb, Eq. Rep. 137. 1 Eq. *Abr.* 209, c. 13.
(*c*) Noy, 48.
(*d*) 12 Mod. 593. 2 *Eq. Abr.* 320, c. 8.
(*e*) 2 Cromp. M. & Ros. 28.
(*f*) 3 Atk. 693.
(*g*) 1 Sim. & Stu. 463.
(*h*) Cowp. 657.
(*i*) 5 Barn. & Ald. 785.
(*j*) 2 Cr. & Jerv. 75.
(*k*) Cowp. 352.

Cresswell and *Starkie*, *contrà*.—The Courts will so construe a will as to carry into effect the intentions of the testator, if it can be done without contravening any rule of law. The case mentioned in *Roll's Abridgement* is no authority, as in that case it is clear there were leases for years which would satisfy the intention of the testator. The case of *Clements* v. *Cassye* is but shortly reported, and the observation already made by the Court is an answer to it. The case of *Shaw* v. *Bull* is not a case the report of which can be much relied on. In the case of *Thomas* v. *Phelps* (*l*) a similar devise to the present, but in more general terms, and omitting the word "lands," was nevertheless held to pass a fee. The case of *Doe*, d. *Gillard*, v. *Gillard*, is alone sufficient authority to make this rule absolute. The case of *Piggot* v. *Penrice* is clearly distinguishable, as great stress was there placed on the association of the words "goods, lands, and chattels," the word "lands" being so placed between words relating to the duties of an executor. Then as to the intention of the testator, there is no doubt but that, by the direction to pay all his debts and funeral expenses, the real estates are in general considered to be charged (*m*). Two exceptions are made to this general rule; one, when there is a particular fund for the payment of debts; the other, when the duty is thrown on the executor, but no real estates are devised to him. Those positions are laid down in *Powell on Devises* (*n*), and in support of them the cases of *Awbrey* v. *Middleton* (*o*), and *Alcock* v. *Sparhawk* (*p*), and several other cases, are cited. In the case of *Goodtitle*, d. *Paddy*, v. *Maddern* (*q*), the same principle was laid down, and other similar cases might be referred to.

Cur. adv. vult.

Lord DENMAN, C. J., this day delivered the judgment of the Court.—This was a motion by leave to enter a verdict for the defendant, as devisee under a will, which, after directing all the testator's debts and funeral expenses to be paid by his executor, giving several annuities for life, and bequeathing 5*s.* to the plaintiff, who was his heir at law, concluded by appointing the defendant his whole and sole executor of all his houses and land situate at B. We do not think it needful to go into the authorities which have been so recently considered by the Court in the case of *Doe*, d. *Hickman*, v. *Haslewood* (*r*). It was admitted by the learned counsel for the plaintiff, and is perfectly clear, that if the defendant took any interest it must be a fee-simple, and no man applying common sense to the construction of the will can doubt that the estate was given to the defendant. No decided case opposes any obstacle to our arriving at this conclusion, and the rule must be made absolute.

Rule absolute.

(*l*) 4 Russ. 348.
(*m*) See *Doe*, d. *Willy*, v. *Holmes*, 8 Term Rep. 1, and *Doe*, d. *Palmer*, v. *Richards*, 3 Term Rep. 356.
(*n*) Edited by Jarman, vol. ii. p. 649. 653. *et seq.*
(*o*) 2 Eq. Ca. Abr. 497, p. 16.
(*p*) 2 Vernon, 228, 1 Eq. Ca. Abr. 198, p. 4.
(*q*) 4 East, 496.
(*r*) See this case and the other authorities there cited, post, p. 116.

King's Bench.

Jan. 16.

DOE, dem. HICKMAN, *v.* HASLEWOOD.

Under the following devise: "I give and bequeath unto my wife *A. H.*, to her heirs and assigns for ever, all the residue of my goods, chattels, and personal estate whatsoever and wheresoever, and also all my right, title, and interest of, in, and to all and every sum and sums of money whatsoever which now is, are, or shall be due to me upon and in virtue of any will, bond, or other securities, and *I do likewise make my wife full and sole executrix of the freehold house situate in Great Queen Street*:"—*Held*, that a fee simple in the house passed to the wife.

EJECTMENT to recover possession of a house in *Great Queen Street*, in the parish of *Saint Giles in the Fields*, in the county of *Middlesex*. The cause was tried before Lord DENMAN, C. J., at the sittings after *Michaelmas* Term, and a verdict found for the plaintiff, subject to the following case:—

It was proved for the plaintiff that Mr. *George Haslewood*, being seised in fee of the said house, made his will duly executed so as to pass real estates in the following words:—"In the name of God, Amen, I *George Haslewood*, of *Swallow Street*, No. 50, in the parish of *Saint James*, *Westminster*, being of sound and desposing mind and memory, praised be Almighty God for the same, do make and ordain this for my last will and testament, in manner and form following; viz., I give and bequeth unto my Wife *Ann Heaslewood*, to her heirs and assings for ever, all the residue of my goods, chattels, and personal estate whatsoever and wheresoever, and also my right, title, and interest of, in, and to all and every sum and sums of money whatsoever which now is, are, or shall be due to me upon and in virtue of any will, bound, or other securitys; and I do *likewise* make my Wife, the said *Ann Heaselwood*, *full and sole executrizax of the freehold house* situate in *Great Queen Street*, No. 15, in the parish of *Saint Giles in the Fields*, Bein the north side of the street, in the county of *Middlesex*. This, my last will and testament, hereby revoking all former wills by me made; in witness wheare of I, the said *George Heaslewood*, the testater, have sit and put my hand and seal this day fourth of *June*, in the year of our Lord one thousand eight hundredth and five.

"GEORGE HEASLEWOOD."

The testator died in *December*, 1805, leaving *Ann Haslewood*, his widow, him surviving. The testator and his wife lived in the house until the time of his death, she afterwards married *Thomas Vincent*, who died in *December*, 1817, and in *July*, 1826, she married *John Adie*, and she with her husband continued in possession of the house until her death in *November*, 1833. The lessor of the plaintiff is her nephew and heir at law. The questions for the opinion of the Court are, 1st. Whether *Ann Haslewood* took an estate in fee-simple under the will of her husband? 2ndly. Whether, under the facts of the case, the plaintiff is entitled to recover? The verdict to be entered accordingly. The case was argued in *Michaelmas* Term last (*a*).

Sir *W. W. Follett*, for the lessor of the plaintiff.—This will was obviously penned by an illiterate person, but the words used are sufficient to pass the fee-simple of the estate in question. The intention of the testator clearly was to give his wife an absolute interest in his personal estate, and the only natural construction of the words "full and sole executrix, &c." taken with the context, must be that the testator meant to give as full and absolute an interest in the freehold property as he already had done in the personal.

(*a*) Cor. Lord *Denman*, C. J., *Patteson*, *Williams*, and *Coleridge*, J.

Words used in a will are not necessarily to receive their strict legal construction (*b*). The words "heir," "executor," "son," "child," &c. occurring in a will have been said by the Courts to be words of flexible meaning. [Patteson, J.—Is it not rather that the words are rejected altogether?] There are cases in which the word "heir," as applied to personalty has been interpreted to mean executor, *Holloway* v. *Holloway* (*c*). So on the other hand "executor" has been held to pass a fee-simple interest, *Doe* v. *Gillard* (*d*), *Loveacres* v. *Blight* (*e*); to be equivalent to "heir," *Rose* v. *Hill* (*f*). In order to effectuate the intention of the testator, the Courts have interpreted "personal estates" to mean real, *Doe* v. *Tofield* (*g*). In *Roe* v. *Patteson* (*h*) the testator, after making several bequests out of his stock in the four per cents., adds, "I leave all the remainder in the above stocks, with my freehold property, to my sister," and the Court held that she took a fee-simple, because, as Lord *Ellenborough* said, it was clearly the intention of the testator to give as absolute an estate and interest in his freehold property as in his stock. That reasoning applies precisely to the present case, and there is the same collocation of the bequests. No doubt in the cases cited some circumstances or expressions have existed to shew what the testator's meaning was. But that is so here, to at least an equal extent with any other case. There is nothing to shew that an interest for life only (which it would be conceded the widow took by this devise), or of any other nature, was intended, and it was impossible to suggest for what purpose the devise was introduced unless to convey an interest in fee. A very slight transposition of the words would remove every difficulty. If the words "and I do likewise make my wife *A. H.* my full and sole executrix," be read after the devise of the freehold house instead of before, the whole becomes good sense and good English. There are cases in which the word executor as applied to land has been held not to pass a fee, but the reasons given by the Courts distinguish them from the present. In *Piggot* v. *Penrice* (*i*) the whole of the testator's estates real and personal were laid together: "I make my niece executrix of all my goods, lands, and chattels." And the Court said that there was nothing to shew an intention to give an interest in any real property specifically. The same distinction exists with regard to *Clement* v. *Cassye* (*j*), and *Shaw* v. *Bull* (*k*), which last case scarcely applies, and is of very doubtful authority. [Patteson, J.—"I make a man my sole heir" gives a fee simple, therefore the words "I make a man my sole executor," if they mean anything, should mean the same; but then this difficulty occurs, that, if we construe executrix to mean devisee, there is no executrix at all, for the wife is not made executrix generally, but only to this devise.] Lastly, if it be held that no interest passed, then there has been an adverse possession for more than twenty years, which gives a sufficient title to the lessor of the plaintiff.

Butt, contrà.—The clause which applies to this house must be taken by

(*b*) Lord *Mansfield*, in *Loveacres* v. *Blight*, and see all the cases collected in *Com. Dig.* tit. Estate by Devise.
(*c*) 5 Ves. jun. 399.
(*d*) 5 B. & A. 785.
(*e*) Cowp. 352.
(*f*) 3 Bur. 1881.
(*g*) 11 East, 246.
(*h*) 16 East, 221.
(*i*) Prec. Chan. 471. 1 Eq. Cas. Abr. 13.
(*j*) Noy, 48.
(*k*) 12 Mod. 593.

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itself, and not read with others: if it is to be taken as a bequest of the freehold house, then only an estate for life passed. The cases that have been cited on the other side were all decided on the grounds that the intention of the testator was manifestly pointed to such an interpretation of the words used as was adopted by the Court. That intention had been collected either from the circumstances of the testator, or the general tenor of the will. The case of *Loveacres* v. *Blight* (*l*) has been contradicted, and there the will began with an expressed intention to devise all the testator's "worldly estate," and it was by virtue of those words, and the intention there appearing, that the fee passed. In *Doe* v. *Gillard* (*m*) there was a charge upon the estate devised, and, according to the rule, where there is a charge, the fee may pass though apt words are not used. The case of *Den* v. *Gaskin* (*n*) is a strong authority for the defendant, because there the will began by expressing the testator's intention to dispose of all his worldly estate; he then *gives and bequeaths* his freehold property to *M. R.* &c.; there also was a pecuniary legacy to the heir at law. Lord *Mansfield* intimates his belief that the testator meant to pass a fee, yet inasmuch as the words used were insufficient, the Court decided that the fee-simple did not pass; because, as Lord *Ellenborough* observes, in *Goodright* v. *Barron* (*o*), where there are no words of limitation, and no *necessary* implication from the words of the devise to give a larger estate, the devisee can only take an estate for life. *Shaw* v. *Bull* is a case that has never been impeached, neither has that cited by *Powell*, J., from *Noy*. The words in the latter are almost the same as in the present. The words used in *Den* v. *Mellor* (*p*) are much stronger than the present, yet this Court held that the wife in that case took only an estate for life, and that judgment was affirmed by the House of Lords (*q*). *Doe* v. *Baines* (*r*) is to the same effect. The case of *Holloway* v. *Holloway* decides nothing upon the present question, but the Master of the Rolls intimates that, under such words as those here used, the fee does not pass. In this case there are not words of charge, as in so many others where a fee has been held to pass (*s*), neither is there anything to shew the testator's intention either to pass the whole of his property or to disinherit his heir. It has been laid down that we are not to hunt about for the testator's intention, but to gather it from the words used. Now on the face of this case, we are so far from being able to say that his intention was to disinherit his heir, that there is hardly enough to raise a question whether it was so or not (*t*).

Sir *W. W. Follett*, in reply.—The case finds that the widow was in possession more than twenty years, which of itself gives a title in ejectment; *Doe* v. *Cooke* (*u*). [Patteson, J.—If the devise gives nothing to the widow she would have been entitled to her dower and so have been in possession.] Till that was set out by metes and bounds, she would have no more title to possession than a mere stranger. [Lord Denman, C. J.—At the trial no point was made about adverse possession; if there had been, I should have asked the other side whether they could not have explained it.] No authority has

(*l*) Cowp. 352.
(*m*) 5 B. & A. 785.
(*n*) Cowp. 657.
(*o*) 11 East, 220.
(*p*) 5 Term Rep. 558.
(*q*) 2 Bos. & Pul.
(*r*) 2 C. M. & R. 23.
(*s*) *Doe* v. *Holmes*, 8 Term Rep. 1. *Goodtitle* v. *Maddern*, 4 East, 496. *Doe* v. *Woodhouse*, 4 Term Rep. 89.
(*t*) See *Noel* v. *Hoy*, 2 Madd. 38.
(*u*) 7 Bing. 346.

been cited to shew that, where the intention has been to devise a specific real estate, it has not passed. The word executor could only be used with the intention to convey the same absolute interest in the realty, which an executor has over the personalty. And the Courts have determined that a fee did or did not pass, according as the word was or was not used in the manner in which it is used here, *Loveacres* v. *Blight* (*x*), *Den* v. *Gaskin* (*y*). *Goodright* v. *Barron* (*z*) leaves untouched the question, whether the appointing a person executor of lands passes the fee, because there is no such appointment in that case, and the point never was nor could have been raised: in *Trent* v. *Hanning* (*a*) the phrase "trustees of inheritance," and in *Doe* v. *Gilbert* (*b*) a devise "of testamentary effects," was held to pass the fee, as shewing the intention to give the whole estate; *Marret* v. *Sly* (*c*) is to the same effect. There is no case precisely similar to the present, but the ruling principle has always been to carry into effect the intention of the testator, and to do this legal terms when improperly used have been construed as the testator has been supposed to mean them: thus, heirs have been referred to personalty, heirs male of the body to mean words of purchase, &c. *Goodtitle* v. *Herring* (*d*), &c.

Butt, in answer to the cases quoted in the reply.—*Doe* v. *Gilbert* is an authority for the defendant, for *Dallas*, C. J., held that an estate for life only passed by the clause devising the real property taken alone, and that it was only by connecting it with the expressed intention to dispose of the whole in the introductory clause, and the words *all my testamentary estate and effects* in the residuary clause, that the fee passed. There are no such reasons for coming to that conclusion here.

Cur. adv. vult.

Lord DENMAN, C. J., now delivered the judgment of the Court.—After reciting the will, and stating the facts of the case, his Lordship proceeded as follows:—Upon the argument of this case many cases were cited, not, we think (with one exception), bearing directly upon this, but rather in illustration of the general principle upon which our decision ought to be founded. We have referred to those cases and perused them, and are clearly of opinion that none can be considered to be directly decisive of this point. We could not fail to observe, however, upon that perusal, a constant reference to the principles upon which this and every other will is to be construed, viz., "That every case of this sort depends upon its own peculiar circumstances, for in every case the question is one of construction, to be made on the whole of the will; every case therefore is individual" (*e*). The question for our decision seems to depend upon two points: first, whether the intention of the testator can be clearly and satisfactorily collected from the will; second, whether we are enabled, consistently with the rules of law, to carry that intention into effect. Upon the first point it is to be observed, that it does not appear that

(*x*) Cowp. 352.
(*y*) Cowp. 657.
(*z*) 11 East, 220.
(*a*) 7 East, 97.
(*b*) 3 B. & B. 85.
(*c*) 2 Sid. 75.
(*d*) 1 East, 269.
(*e*) Per *Dallas*, C. J., in *Doe* v. *Gilbert*, 3 B. & B. 88.

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the testator was possessed of any other property beyond that which is noticed by his will.

Nor can we perceive any allusion to any other object of his bounty, except his wife. Moreover, in the earlier clause of the will, all the testator's personal property, including everything due to him upon securities of every kind, is (though the words "heirs" is there as much misapplied as the word "executrix" to the freehold house), beyond all doubt, bequeathed to the wife. Having thus completed his purpose with respect to the whole of his personalty, the will immediately proceeds to notice the only remaining property of the testator—his freehold house, No. 15, *Queen Street*, in the parish of *St. Giles*. For what purpose then can we suppose that the house was introduced into the will at all? Why is it mentioned in immediate connection with property most certainly disposed of, if he meant to die intestate with respect to it? We can discover no other probable or reasonable supposition, but that the house was introduced into the will with the intention of disposing of it; and if so there is no other conclusion possible, but that he meant the disposition to be in favour of his wife. We therefore think that, by the words "I do likewise make my said wife full and sole executrix of the freehold house, &c.," the testator did intend to devise that house to his wife; and that (however inartificially he has executed his purpose) he fully believed that he had done so. Whatever effect can reasonably be given to the word "likewise," we are not, we think, authorized to reject and expunge, as wholly insignificant and unmeaning, a clause in the will in which we have no doubt that the testator himself thought his meaning had been most fully and even learnedly expressed. And if this clause must be retained, as we are of opinion it must, it seems impossible to say that the testator did not intend to give to his wife some interest, and if so, there is not only nothing to limit the intention to giving her anything less than "the full and sole" dominion over the house in question, or, in other words, an estate in fee-simple therein; but the terms "full and sole executrix," as it would import the grant of the entire interest and dominion in and over property whereto it is correctly applicable, evinces an intention to grant no less in that to which it is through ignorance misapplied. Thus much, therefore, as to the intention of the testator. The solution of the first point has, we think, a very considerable effect in disposing of the second; indeed the last argument, if correct, concludes the question; because we are aware of no authority, and none such has been suggested, which affects to impose a limit beyond which the Courts shall not proceed in their favourable construction of wills, to carry into effect the intention of a testator. Words which are supposed to have (and which really have, when correctly and technically applied) a precise and definite meaning, are bent and diverted continually from that meaning, if the sense of the will requires it. "Heirs," "issue," "son," &c., are familiar instances of the kind now alluded to. The word "legacy" must be admitted to have a direct reference to a bequest of personalty, and not to a devise of land; yet, in *Hardacre* v. *Nash* (*f*), in which, by the former part of the will, there had been 150*l.* each given to a son and daughter of testator, afterwards certain land to each, and afterwards it was provided that, upon their death, "those legacies that had been left them should return to his wife," Lord *Kenyon*

(*f*) 5 T. R. 716.

thus states and deals with the argument arising from the proper meaning of the word: "Considerable stress was laid on the word 'legacies,' and it was argued that that word was an appropriate term applicable to personal estate only, but the same technical and correct expressions are not to be expected from unlettered persons, as are usually found in wills drawn by professional men; even if there were no decision warranting us in saying that the word 'legacy' may be applied to the real estate, if the context required it, I should have had no difficulty in making such a determination for the first time." His Lordship then adds, "that such a construction had been put upon it (as it had most undoubtedly) in *Hope* v. *Taylor* (*g*), upon the short ground that it was most agreeable to the intention of the testator, in that case, to construe the word 'legacy' to extend to land." *Doe* v. *Tofield* (*h*), however, carries the principle as far perhaps as can be necessary for the decision of this or indeed any other case. The only question was (as stated in the judgment delivered by the Court), whether freehold lands passed under the words "all my personal estate;" and the Court had no hesitation in saying that the lands did pass by that description. One only case (the excepted one before alluded to) we understood to be adduced as in point, for the purpose of shewing that, whatever may be the probable conjectures, the Court cannot, or at least ought not, to infer that a fee passed to the wife in this case, because the same inference has been before repudiated under similar circumstances. This case is *Piggot* v. *Penrice* (*i*). We, however, are so far from thinking that it is in point that the manifest distinction between the cases, and even the reasoning of the Lord Chancellor, seem clearly to lead to a conclusion in favour of the lessor of the plaintiff. The question in that case arose entirely upon the following words:—"I make my niece executrix of all my goods, lands, and chattels," and it was whether under those words any lands could pass. Now before we refer to the reasons of the Lord Chancellor, it is impossible not to perceive the extreme dissimilarity between that case and the present. There, the word "lands" is placed in the midst of words strictly and legally referrable to the character of executrix; in the present case, no personalty is alluded to in the clause in question, but the wife, after a bequest of the personalty, is made "sole and full executrix" of a freehold house only. The Lord Chancellor, in reasoning upon the case, for the purpose of shewing that the heir could not, upon such uncertainty, be disinherited, does not rest upon the effect of the word "lands," being neutralized by its juxta-position with personalty, but proceeds to observe, "that the word 'lands' was not to be rejected as useless, for probably there might be rents in arrear of those lands, and, by making her executrix of her (testatrix's) lands, those rents would pass." Now in this view of the case, there was no inference whatever to be drawn in favour of an intention that lands should pass, of course therefore it furnishes no argument against giving that effect to words which make that intention clear. The word "executrix" happens to have received a different construction in two other cases. In *Clements* v. *Cassye* (*j*) the devise was of *Blackacre* and *Whiteacre* to the wife for life, remainder in *Blackacre* to *J. S.* in fee, the remainder in *Whiteacre* not being given over: "And I make my wife executrix of my goods and land." But here the

(*g*) 1 Burr. 268.
(*h*) 11 East, 246.
(*i*) Prec. Chan. 471.
(*j*) Noy, 48.

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limited devise of land, followed by the combination of land with goods, was justly thought to negative the intention of devising the remainder in *Whiteacre* to the wife. In *Shaw* v. *Bull* (*k*), testator seised of five houses devised four specifically to several persons, one of these four to his wife in fee charged with legacies; finally, "all the overplus of my estate to be at my wife's disposal, and make her my executrix." The Court was divided in opinion. *Nevill*, J. thinking that a fee passed to the wife in the fifth house also; the Chief Justice *Trevor*, *Powell*, J. and *Blencowe*, J. differed from him, not because the words were incapable of passing the fee, if the intent were clear, but because they thought the intent negatived by the other provisions. The last case which we shall notice is that of *Thomas* v. *Phelps* (*l*), and we do so partly because the testator had made nearly the same indiscriminate abuse of terms as in the present instance, and because the Master of the Rolls treats very lightly such abuse and confusion. In that case the testator had given a certain house to his son *James Phelps*, and then added, "him and my daughter *E. P.* I make my joint executor and executrix of this my will, of all that I possess, in any way belonging to me, freely to be possessed and enjoyed, only my household furniture, which I give to my daughter who lives longest single," &c. Upon this will the argument was, that the gift being to an executrix, she could only take personal property; and further, that if the clause could pass a freehold, there were no words of limitation to carry it beyond a life estate. The Master of the Rolls observed, "That it was the will of a person who had not the advantage of professional assistance, and was plainly ignorant of the nature and character of the office of executor, and of the distinction between real and personal estates, as it regards that office." He then adverted to the words above set forth, and said, that they were equivalent to the gift of all the testator's property, and would pass all the testator's interest in that estate. Upon the whole, we are of opinion that the intention of the testator clearly was to give to his wife *Ann Haslewood*, the freehold of the house in question: and further, that the words in the will are sufficient to carry that intention into effect, and that no rule of law will be contravened by our giving judgment for the plaintiff.

Postea to plaintiff (*m*).

(*k*) 12 Mod. 593.
(*l*) 4 Rus. 348.

(*m*) See the previous case, p. 113.

SPENCER *v.* NEWTON.

(1) A party to a cause having notice that a motion will be made in one of the superior courts, is not privileged from arrest during his attendance for the purpose of watching the proceedings relative to that motion.

SIR *J. Campbell*, A. G., had obtained a rule calling upon the plaintiff in this action, and also upon *Lane* the plaintiff in another action against the same defendant, to shew cause why the defendant should not be discharged out of custody upon affidavit shewing the following facts.

A cause, in which the defendant was a party, had been referred to the arbitration of a barrister, who held a meeting *January* 7. The defendant, who resided at *Ripon*, attended the arbitration on that occasion, when the

(2) A party privileged during his attendance before an arbitrator has not, after the proceedings are at an end, an extension of privilege, because of his inability through want of money to return home.

Semble.—A party is privileged, while incapacitated by illness from returning home.

or the opposite party complained that the cause had been referred
usly, and announced his intention to make an application on the
the Court of Exchequer, where the action was brought. Upon
arbitrator adjourned the hearing of the cause until *February* 15.
ndant ascertained, on *January* 15th, that no motion had been made
chequer, and on *January* 16th, as he came out of Lincoln's Inn
ng then on his way to the coach-office for the purpose of leaving
he was arrested. The affidavits also stated, that the defendant had
cked by illness, and that he had been without funds to enable him
ondon. The affidavits on the other side stated that the defendant
ry Term by dining in Lincoln's Inn Hall.

Pollock (and *Kelly* on behalf of the other plaintiff *Lane*) now shewed
is not denied that a party is privileged from arrest during his at-
upon an arbitrator, and also *eundo* and *redeundo*; but the privilege
o further than is necessary for those purposes; the utmost limit is,
of the day in which the judicial proceedings have taken place, or
ter, *Spence* v. *Stuart* (*a*), *Randall* v. *Gurney* (*b*). It cannot be
l that the defendant was protected during the whole period between
meetings. Neither does the privilege extend to attendance relative
on in bank; there is no authority for such a position. Such attend-
holly unnecessary, the proceedings being carried on by affidavits.
ment of the defendant's illness is disproved. The period during
privilege exists cannot be extended by the poverty of a party. If
so, there must be a different rule for every case, and some persons
oy a freedom from arrest during the whole of their lives.

Campbell, A. G., *contrà*.—The rule does not depend upon the cal-
f hours and days. The law allows a reasonable time for a witness
d *redeundo*. This has always been interpreted liberally, *Childes-*
Barrett (*c*), *Ricketts* v. *Gurney* (*d*). In a case in the year-books,
as held to be protected *redeundo*, though he went forty miles
way; for the Court said, peradventure he went to buy a horse for
y (*e*). Here the defendant was entitled to remain, at all events,
e first days of Term, to watch the proceedings in the Exchequer,
he had notice. There is nothing to limit the privilege to cases to
d by a jury. Illness has always been held to extend the privilege.
ything will extend it which creates an impossibility of departure,
e violence of the weather; and upon the same principle the poverty
ty producing the same effect must be attended with the same immu-
ere is no greater difficulty attending the inquiry into that than into
stance of illness.

ON, J.—I quite assent to the proposition that we are not tied down
nputation of hours and days; but we must look to what is reason-

4, 8.
A. 262. See 1 Tid. tit. "Privi-
Arrest," where all the cases are

(*c*) 11 East, 439.
(*d*) 7 Price, 699.
(*e*) Bro. Abr. tit. "Privilege," 4.

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able, and see whether a man is *bonâ fide* attending upon the case which is going on in Court for the purpose either of giving evidence, or as a party. [His Lordship then stated the facts of the case.] It seems to be conceded, and indeed is quite clear, that the party in this case was not privileged while waiting in town between the first meeting in the arbitration and the day to which it was adjourned. I find no case at all like this; the case of Mr. *Gurney* (*f*) was decided merely on the grounds that he did not deviate, as it was necessary he should go to *Clifton* in order to prepare himself to give evidence in the Court of Exchequer. So far I quite agree. The other cases that have been cited are all cases where the party was staying for a short time. The case most like this is that cited by the Attorney-General, where the cause was not in the paper, but nevertheless the party was held to be protected, because it was to be tried in the then sittings; and he was there (though he need not have been) waiting for the trial of the cause. But there is a case in the Court of Chancery (*g*), in which a party was held not to be privileged because he came too soon. That was not *morando*, and it was said it was not *eundo*. It was a case where a party was to be examined before the Master, and he went three days before the examination was appointed to take place, in order that he might see the interrogatories, and so be better prepared to make his answer.

There is another case also in Chancery (*h*), in which the arbitration was adjourned to another hour in the same day. I am surprised that the question was raised, for in an adjournment from day to day the witness would have been privileged beyond all doubt. The question then really is, whether or not the notice that a motion would be made in the Court of Exchequer entitled the party to a freedom from arrest while staying in town to see whether it would be made. There was nothing which positively required his attendance in the Court, because no motion was made. However much we may be disposed to extend this privilege, it would be going a great deal further, not only than any of the decided cases have gone, but beyond any reasonable principle, to say that it existed under such circumstances. It has been argued, that it was impossible for this party to go away, but inasmuch as that impossibility arose from want of funds, the Court cannot notice it. That is his misfortune, but cannot be a reason for any extension of the ordinary privilege.

WILLIAMS, J.—The only ground for claiming the privilege which can be relied on here was, that the party was waiting in order to watch the event of a motion in the Court of Exchequer. Now an application of that sort differs in very many respects from proceedings to which allusion has been made. It must proceed upon affidavits. There is no necessity, if indeed any possibility, of showing cause *instanter* by the presence of the party. He has a full and perfect opportunity, whether in *London* or elsewhere, of knowing the grounds of that application, and of meeting it as effectually, if not as early, as by his actual presence in Court. I am at a loss, therefore, to discover what immediate benefit, if any, would result from the presence of the party him-

(*f*) *Ricketts* v. *Gurney*, 1 Chit. 682. 7 Price, 699.
(*g*) *Gibbs* v. *Philipson*, 1 Russ. & Mylne.
(*h*) *Ex parte* Temple, 2 Ves. & Beames, 395.

lf. With regard to the subject of illness, which has been commented on, id which was the only point I inquired about, I cannot say on these affi- avits that there is anything sufficient to induce the Court to act; because e cannot close our eyes to the fact that the party was from day to day abled to attend at dinner in Lincoln's Inn Hall.

COLERIDGE, J.—I am quite of the same opinion. The only thing I was ither anxious about as to the facts of this case was, to see how the circum- ance of illness was made out; because I certainly should have thought, if e delay had been a delay of illness unconnected with any other cause, that ould have been a sufficient ground for his discharge; but I cannot say, pon these affidavits, that illness was, by itself and disconnected with the overty of the party, the cause of his delay. I do not think we are at liberty o take into account the casual want of money. If so, we should soon have wo different laws, according to the circumstances of the parties.

Rule discharged.

The KING *v.* The Mayor and Corporation of OXFORD.

Jan. 28.

The mayor of Oxford declared T. one of the council disqualified, on the ground that his name was not on the burgess lists of the year; and, another person having been elected in his room, refused to allow T. to take any part in the proceedings of council. A rule for a *mandamus* to the corporation to restore T. was discharged with costs on the grounds; 1st, That the election of the new councillor not being merely colourable, *quo warranto* was the proper remedy, and not *mandamus* to restore applicant to an office filled by another. 2nd, That the corporation not having taken part in the removal of applicant, the rule was misdirected.

BINGHAM, on the 14th *January* of this term, obtained a rule directed to the mayor, aldermen, and burgesses of the city and borough of *Oxford*, to shew cause why a *mandamus* should not issue commanding them to restore *John Towle* to the office of councillor of the said city and borough.

Mr. *Towle*, on the first formation, in *January*, 1836, of the town council for the city and borough of *Oxford*, under the Municipal Corporation Act (5 & 6 W. 4, c. 76), was elected councillor of the south ward, and accepted the office. On the 6th *September*, 1836, the town-clerk received from the overseer of the different parishes of the city and borough the burgess lists, which he forthwith caused to be delivered to a printer, with directions for copies to be printed pursuant to the 15th section of the above Act. On *Saturday* the 10th *September* the printed copies were sent to the town-clerk, who immediately caused to be fixed on the usual place, near the outer door of the town-hall, a copy of the burgess list of each parish, where it remained until after the 15th *September* instant. The name of Mr. *Towle* was not on any of these lists. Mr. *Towle*, however, did not give any notice to the town-clerk of the omission, nor make any claim for the insertion of his name. On the 4th *October* an open court was duly holden at the town-hall, for the revision of the burgess lists, before the mayor and two assessors chosen for the purpose. No application was made at this Court on behalf of Mr. *Towle* to have his name put upon the lists, nor was the attention of the mayor or of the assessors called to the fact of his name not being on the lists, until the 29th *October*, when the mayor having ascertained the fact, and having been advised that Mr. *Towle* had thereby ceased to be a councillor, gave public notice of the vacancy, and on the 1st of *November* following, Mr. *Dry* was elected in the place of Mr. *Towle*. On the 9th *November* a council was holden pursuant to the provisions of the act, at which Mr. *Towle* attended, when the mayor, acting under advice, informed him, that he [the mayor] could

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not hear anything Mr. *Towle* had to say, or to take his vote, or allow him to take any part in the proceedings. The mayor, aldermen, and burgesses in their corporate character, did not appear to have taken any part in the removal of Mr. *Towle* from his office.

Sir *J. Campbell*, A. G., and *Amos*, shewed cause.—The absence of Mr. *Towle's* name from the burgess roll disqualified him as a councillor. Sect. 28 of the Municipal Corporation Act says, that no person, "shall be qualified to be elected, or to be a councillor or alderman of any such borough, who shall not be *entitled* to be on the burgess list of such borough." By sect. 29, "Every burgess of any borough who shall be *enrolled* on the burgess roll for the time being of such borough, shall be *entitled* to vote in the election of councillors, and of the auditors and assessors hereinafter mentioned for such borough, and no person who shall not be *enrolled* in such burgess roll for the time being shall have any voice or be entitled to vote in any such election." It would be strange if, notwithstanding this clause, which incapacitates *Towle* from voting in any election of councillors, he should possess the higher privilege of being himself a councillor. The omission of his name from the burgess roll is at least *primâ facie* evidence that he was not entitled to have it inserted in that roll; and he has neglected to avail himself of the provisions of the 17th section, which says, that "Every person whose name shall have been omitted in any such burgess list, and who shall claim to have his name inserted therein, shall on or before the 15th day of *Sept.* in every year, give notice thereof to the town-clerk in writing. [COLERIDGE, J. —*Rex* v. *Tripp* (*a*) was the converse of this case. There the name of the party was on the burgess roll, and it was contended that it should not have been.] If it is reasonable, when the name of a person is on the roll, as in that case, that his title may notwithstanding be questioned, it is also reasonable, on the other hand, that the omission of his name should be conclusive against him, when he has taken none of the steps allowed by the act for the vindication of his title. The not being on the roll, and the not being entitled, are, for the purposes of this act, the same thing.

In the next place, this rule is not only misconceived in form but is directed against the wrong parties. *Rex* v. *Beedle* (*b*), and *Rex* v. *The Mayor of Colchester* (*c*), shew that, where an office is already full, *quo warranto* to remove the person filling it, is the proper remedy, and that this Court will not grant a *mandamus* to admit another person. *Dry's* election cannot be treated as a nullity, and the consequence of granting this rule will be that two persons will be in possession of the same office. [COLERIDGE, J.—Will not a point be made by the other side on the 52nd section, and on *Rex* v. *Chitty!* (*d*).] That case arose on the 52nd section. There is a difference between the disqualifications enumerated in the two sections. A declaration that the office has become void is only necessary where the disqualification arises under the 52nd section. In cases of disqualification under sec. 28, as if a party be a clergyman, or be not on the burgess roll, the office is *ipso facto* vacant, and no declaration at all is requisite. This rule is also misdirected. It should have been against the mayor only; the corporation have taken no

(*a*) Decided in Mich. Term, 1836, but not yet reported. The application in that case was for a *quo warranto*, which was granted.
(*b*) 3 Ad. & Ell. 467.
(*c*) 2 T. R. 269.
(*d*) 1 Nev. & Perr. 78.

splacing Mr. *Towle*. [Coleridge, J.—Could the mayor alone n?] It was the mayor alone who refused to take his vote.

m, *contrà*.—Mr. *Towle* has been guilty of no laches; but the which the corporation by their officers have been guilty in neglect- e the burgess lists ready in due time, as required by the Act, has him of the proper opportunity of making his claim. The mere f a party's name from the burgess list is not mentioned as a dis- on for the office of councillor either in the the 28th or 52nd section t. But the absence of *title* to be on the list is a disqualification. re there can in point of fact be no doubt about the applicant being have his name on the roll, an attempt is made to disentitle him by onstruction of this act, in which it is said "the not being on the e same with "the not being entitled." This is a perversion of and the difference in the signification of the two phrases is in the recent act for the amendment of the Municipal Corporation d 7 W. 4, c. 104), section 7 of which exempts councillors and se names are on the burgess roll from any penalty for acting in if they should not be entitled to have their names so enrolled.
he rule being misconceived and misdirected, the case of *Rex* v. *r of York* (*e*) shews that this Court will grant a rule for a to admit to an office already full; and it is properly directed not or, but to the corporation, who are responsible for the conduct of ts.

s, J.—It is not on this occasion necessary to decide the question en raised on the 28th section, namely, on the effect that ought to d to the words "entitled to be on the burgess list;" because on f this case it appears that Mr. *Towle* is at this time actually in the ouncillor, from which, according to the argument, he never has ced. The rule therefore for a *mandamus*, which we are called on ommanding the corporation to restore the said *John Towle* into and office of a councillor of the said city and borough is un-

GE, J.—I am of the same opinion. I think from the facts e, as they are now agreed on by both sides, it is clear that this either wholly or in part misconceived. If everything done by were a mere nullity, and Mr. *Dry's* election merely colourable, ayor and council had moreover declared Mr. *Towle's* place void, tually ousted him from the council; I think, under those circum- s case would have fallen within the observation of Lord *Mansfield*, r v. *Colchester*, namely, that "if the election were doubtful, and fit upon an information in nature of a *quo warranto*, the Court ought t a *mandamus*; but if it were a mere colourable election and clearly ought." On the latter supposition this remedy by *mandamus* ad recourse to; there would have been a *de facto* extrusion from e person rightfully entitled to fill it. But I am not prepared to

(*e*) 4 T. R. 699.

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say, on the statement of these facts, that what has been done is merely colourable. If then it be taken that what has been done is not merely colourable, and that Mr. Dry is *de facto* in possession of this office of councillor, it is clear, according to all the authorities, that a *quo warranto* is the proper mode of proceeding, and not a *mandamus*, which in effect would require the mayor and corporation to receive Mr. *Towle* into an office already filled by another. In *Rex* v. *The Mayor of Colchester* the doctrine is distinctly laid down, that it is a decisive answer to an application for a *mandamus*, that there is another remedy by an information in the nature of a *quo warranto*, by which the title of the officer in possession could be tried as well as by a *mandamus*, and that the consequence of granting the rule would be, that a second person would be admitted to an office which is already filled by another, both claiming to be duly elected. In that case the rule for a *mandamus* was refused. In *Rex* v. *The Mayor of York* a rule for a *mandamus* was granted. In that case there was a dispute between two persons, both claiming to be recorders of *York*. One of them had an actual majority of votes at the election, and the Mayor and Corporation had certified his name to the King for approbation; which proceeding was necessary for the completion of his title to the office. The applicant for the *mandamus*, although he had not the actual majority, shewed that improper votes had been admitted in favour of his opponent, and came to this Court for a *mandamus* to the Mayor and Corporation to certify his name also to the King, and the Court granted the *mandamus*. But the distinction between the two cases is obvious. By neither of the contending parties was the office absolutely filled. One party had already obtained a certificate from the Corporation to the King to complete his title, and the other desired only to have the same means furnished him for the completion of his title, so that the validity of it might be put into a proper train of investigation. The decision in that case does not appear to me to impeach in any way the correctness of the decision in the King and the Mayor of *Colchester*. The *Rex* v. *Beedle* also must be considered as an authority on the present point. There the rule for the *mandamus* was discharged on the same ground; and the Court, on the application of the party, granted, as we are disposed to do in this case, a rule *nisi* for a *quo warranto*.

Sir *J. Campbell*, A. G., and *Bingham*, were then heard on the question of costs.

COLERIDGE, J.—It may be a hard case on the applicant; but, on the ground that he has misconceived his remedy and applied against an innocent party, this rule must be discharged, with costs.

Rule for a *mandamus* discharged, with costs.
Rule *nisi* granted for a *quo warranto*.

The KING *v.* The Mayor and Burgesses of the Borough of BRIDGEWATER.

January 27.

SIR *W. W. FOLLETT* this Term obtained a rule calling upon the mayor, aldermen, and burgesses of *Bridgewater* to show cause why a *mandamus* should not issue, commanding them to prepare and execute a bond under the common seal of the said borough, conditioned for the payment to *T. Trevor* of the yearly sum of 101*l.* 12*s.* 4*d.*, and to deliver the bond so executed to the said *T. Trevor*. From the affidavit of Mr. *Trevor* it appeared, that in the year 1833 he was appointed common clerk and clerk of the peace of the borough of *Bridgewater*. To these offices the office of clerk to the justices was a sort of appurtenance, and was held by him, according to the usual practice, in conjunction with them, until *December* 26th, 1835, when a new council for the borough was appointed under the New Municipal Act (*a*). On the 1st *January*, 1836, he was appointed town clerk and clerk of the peace, which offices had been substituted in the borough for his former office of common clerk. On the 15th *February* following, a separate commission of the peace having been granted to the borough under section 103 of the above act, another person was appointed to the office of clerk to the justices, which by section 102 of the same act is rendered incompatible with the office of clerk of the peace. *Trevor* therefore demanded compensation from the council under section 66, for the loss of the emoluments formerly enjoyed by him as clerk to the justices. The council having refused compensation, he appealed, according to the provisions of the last-mentioned section, to the Lords of the Treasury, by whom his claim was allowed, and an order made that the council should pay him the above annuity in compensation for his loss of office. A bond conditioned for the payment of this annuity was then, in pursuance of section 67, prepared and tendered to the council for execution, and upon their refusal to execute it, the present rule for a *mandamus* was obtained.

Sir *J. Campbell*, A. G., and *Erle*, now showed cause.—This application is founded on section 66 of the New Municipal Act, which says, "Every officer of any borough or county, who shall be in any office of profit at the time of the passing of this act, whose office shall be abolished, or who shall be removed from his office, under the provisions of this act, or who shall not be re-appointed as aforesaid, shall be entitled to have an adequate compensation, to be assessed by the council, and paid out of the borough fund, for the salary, fees, and emoluments of the office which he shall so cease to hold, regard being had to the manner of his appointment to the said office, and his term or interest therein, and all other circumstances of the case; and in case the person preferring such claim shall think himself aggrieved by the determination of the council thereon," power of appeal is given to the Lords of the Treasury, who are to make such order thereupon as to them shall seem just. The question is, whether this Court will direct a *mandamus* for the purpose of effectuating the order made in this case. If the office of

1. By the usage of the borough of *B.* the office of clerk to the justices was appurtenant to the office of common clerk. After the passing of the Municipal Corporation Act (5 & 6 *W.* 4, c. 76,) a separate commission of the peace was granted to the borough; and the person who had been common clerk, which office was then abolished, was in lieu thereof appointed town clerk and clerk of the peace, but not, as formerly, clerk to the justices also; such office being by s. 102 of the act incompatible with that of clerk of the peace:—*Held*, that the Lords of the Treasury had jurisdiction under s. 66 to make an order on the town council to compensate him for the loss of such office, and a *mandamus* was granted to enforce their order.

2. The word "office" in s. 66 is not used in its strict legal sense.

Semble. If the Lords of the Treasury should act without jurisdiction in making an order of compensation for that which is no office, their order would not, under s. 66, "be binding on all parties," nor would this Court enforce obedience to it.

(*a*) 5 & 6 *Will.* 4, c. 76.

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which Mr. *Trevor* has been dispossessed is not an office within the meaning of the act, the Lords of the Treasury had no jurisdiction, and their order is a nullity. No such office as that of clerk to the justices is to be found in the borough charter. Mr. *Trevor* had no permanent interest in the office. No resolution for his formal dismissal would have been necessary, and unless re-appointed from time to time he would have become *functus officio*. In *Ex parte Sandys* (*a*) it was decided, that a clerk to justices has no legal hold upon his office, that his office is during pleasure, like that of a vestry clerk. *Rex* v. *Jotham* (*b*) shows that a party must establish a good *prima facie* title to an office before this Court will interfere by *mandamus*. The situation of clerk to the justices cannot properly be termed an office at all; an assize would not lie for it, nor could an action for money had and received be brought to recover the profits of it. The Lords of the Treasury can only adjudicate upon the quantum of compensation to be paid to a person who has lost any office within the meaning of the Municipal Act; whether any particular employment be in point of law an office, and whether it be such an office as is contemplated by this act, remains entirely a question for this Court. If in their decision upon such a question they should err, this Court will correct them, in like manner as it corrects the Ecclesiastical Courts if they misconstrue a statute. Even if it be conceded that Mr. *Trevor* has been dispossessed of an office, it was an office, not of the corporation, but of the magistrates. He is not brought within the act; his office is not abolished, nor has he been dispossessed by the council, but by his own choice in taking upon himself a new office, which the act renders incompatible with the office in question.

Sir *W. W. Follett*, and *Jardine, contrà*.—The decision of the Lords of the Treasury is final; an appeal is given to them in the last resort. Their order, by section 66, is to be "binding on all parties." They have come to a proper decision, which this Court, even if it had jurisdiction, would be unwilling to disturb. The applicant, when common clerk, enjoyed the office of clerk to the justices as a customary appurtenance to his principal office. The word "office" is not used in this act in any strict legal sense, as is demonstrated by the words with which it is associated in section 66, "distinguishing the office, place, situation, employment, or appointment, in respect whereof the same (*i. e.* emoluments) shall have been received." It is said, that no compensation is to be given to any party unless removed from office by the council, or unless his office is abolished by the act. But the act which makes one part of Mr. *Trevor*'s former office incompatible with the other, may, so far as regards the person holding them, be said to have removed him from that part which he can no longer hold. He held, in substance, two situations, to one of which he has not been re-appointed in consequence of the act itself. He is therefore entitled to compensation.

Lord DENMAN, C. J.—This is an application by a person who filled the office of common clerk and clerk to the justices of the borough of *Bridgewater*, for a *mandamus* to compel the town council to execute a bond for the purpose of securing to him the compensation awarded by the Lords of the

(*a*) 4 B. & Ad. 863. (*b*) 3 T. R. 575.

Treasury for the office of clerk to the justices, of which he states himself to have been deprived by the operation of the Municipal Corporation Act. It appears to me quite clear that we ought not to put a strict legal construction upon the word "office" in this act. The question is, whether Mr. *Trevor* has been deprived of a beneficial employment, intended by this act to be made the subject of compensation. The statement in his affidavit is, that he was common clerk, and that, by virtue of such office, he also acted as clerk to the justices, and received certain fees and emoluments for so acting. His claim to compensation for the loss of these fees, having been disallowed by the council, was referred to the Lords of the Treasury, by whom it was sustained, and an order for the satisfaction of it made upon the council. I am of opinion that the Lords of the Treasury had jurisdiction in this matter, and that their order ought not to be set aside. The office of clerk to the justices, although appurtenant to the office of common clerk, may for the purposes of this question be considered a separate office, and as it cannot now be held together with the new one, which has been substituted for that of common clerk, I think Mr. *Trevor* has, by the operation of the Municipal Act, substantially, within the meaning of the legislature, lost an office for which compensation should be given him. I do not mean to say the Lords of the Treasury would have any jurisdiction to award compensation to a person who in our judgment had clearly never been an officer of the borough; but I think, on a fair and reasonable interpretation of the term, the applicant in this instance was such an officer.

WILLIAMS, J.—I am of the same opinion. We are not to construe the word "office" in its strict legal sense. The 66th section, in speaking of the mode in which compensation is to be claimed, directs the claimant to set forth the amount received by him or his predecessors during the period of five years before the passing of the act, on account of the fees &c., in respect whereof he shall claim such compensation, distinguishing the "office, place, situation, employment, or appointment, in respect whereof the same shall have been received." The context itself, therefore, seems to interpret the word "office," and to show that it is there used with greater latitude of signification than might be comprehended by the strict and legal definition of it. We have then only to ascertain whether, upon the facts of this case, Mr. *Trevor* has by the corporation act been deprived of any perquisites and emoluments of a "situation, employment, or appointment" formerly enjoyed by him. On this point there can be no doubt. I think, therefore, the Lords of the Treasury had jurisdiction, and that they have come to a right decision.

COLERIDGE, J.—It seems to me the Attorney-General was quite right in resting his argument on the ground that the order made by the Lords of the Treasury was a nullity; for unless a nullity, it is clear from the language of the act that their order must be final. I should be unwilling to say that they could in any case give themselves jurisdiction; but I am of opinion that this case is in the strictest sense within the 66th section of the act. Before the act passed, Mr. *Trevor* was, in the strictest sense, an officer of the borough, for the common clerk is an officer named in the borough charter; and it is clear that this office is now abolished, and that he has been ap-

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pointed to a new office, that of town clerk, of a totally different description. Suppose he had not been appointed to any new office at all, would he not be entitled to compensation? What would be the measure of that compensation? He would have a right to say that he had been common clerk, and had received the fees of that office; and also that, by the usage of the borough during all his time and that of his predecessors, he had discharged certain duties for which he received certain other fees. Under these circumstances, without doubt, he would have been entitled to compensation for the whole aggregate amount of these fees. But he has been appointed town clerk. His compensation, therefore, is limited to those fees only which he derived from the subordinate situation which he has now lost, and which by the custom of the borough was incidental to his principal office of common clerk. I think, therefore, that he has, in the proper sense of the term, lost an office within the contemplation of this act, and I quite agree with the rest of the Court, that the term is not used in the strict sense given to it in our law books. It appears manifestly from the words of the section read by my brother *Williams*, that the term is used in the more liberal, general, and popular sense, comprising any fixed appointment in a borough, having certain duties attached to it, for the performance of which certain fees are to arise. Either way, as it appears to me, this order of the Lords of the Treasury must be sustained.

Rule absolute for a *mandamus*.

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January 31.

Before the passing of 57 G. 3, the freemen of the city of *York*, who were occupiers of houses in *Monk Ward*, were entitled to right of stray over certain lands of which persons named in the act were seised in fee. By that act, which extinguished the right of stray, commissioners were appointed to allot, and did allot to the mayor and commonalty such parcels of the lands as should be a compensation for those rights, to be held by them, free of all manorial rights, to be enjoyed by the said freemen exclusively in the same manner as the right of stray. At a court of the lord mayor and aldermen held annually, pasture-masters are appointed to regulate the enjoyment of the rights of stray, direct repairs of fences &c., and appoint the herdsman. The pasture-masters are under the superintendance of the wardens, of whom the lord mayor is always one, the other three being aldermen. The wardens are themselves under the general control of a court, formed of the lord mayor, aldermen, existing, and ex-sheriffs. The herdsman's wages and other expenses are defrayed by an annual sum paid by the freemen for each head of cattle. The pasture-masters render yearly accounts to the wardens, the balance of which is always carried forward to the succeeding year. Neither the wardens nor the mayor and commonalty derive any benefit from or on account of the stray. Subsequently to the act, the wardens and pasture-masters let portions of the allotment, and with part of sums received purchased five acres of land, which was conveyed to them and their heirs in trust for the freemen. This land is enjoyed as the other:—*Held*, that the mayor and commonalty were rateable to the poor in respect of the lands allotted, but not of the five acres vested in the wardens and pasture-masters.

ON appeal against a poor's rate for the township of *Heworth*, in the North Riding of the county of *York*, whereby the appellants were assessed in the following terms:—

	Rental.	Assessment.
"The Mayor and Commonalty of the city of *York*, *Monk Ward Stray*.	£177	£5 18*s*."

At the trial at the *Epiphany* Sessions, 1835, the Court confirmed the rate, subject to the opinion of this Court on the following case.

The lands called *Monk Ward Stray* consist of 131 acres and 38 perches of land, situate near the city of *York*, and in the township of *Heworth*. Before the passing of an act of parliament in 1817, (the 57 *Geo.* 3,) the freemen of the city of *York*, who were occupiers of houses within a certain division or ward of the said city called *Monk Ward*, were, together with certain other persons, entitled to a common of pasture and right of stray or average, and

had immemorially used and employed the same in and over a certain parcel of ground called *Heworth Moor*, of which *G. A. T.*, Esq., lord of the manor of *Heworth*, was then seised in fee; and also in and over a certain other farm or piece of land called *Heworth Grange*, of which the King was then seised in fee; and also in and over certain closes and other parcels of ground called *Hall Fields*, the *Groves*, *Turnstile Close*, and *Margery Close*, of which *E. P.*, Esq. and others were then seised in fee. By the said act, commissioners were appointed and authorized to settle the value of the right of stray and average, and to award, assign, set over, and allot (amongst others) to the mayor and commonalty, so much and such parts of the parcels of grounds respectively as should be a compensation and satisfaction for the rights of stray and average of the freemen; and from and after the execution of the award of the said commissioners, the right of stray and average should cease and be for ever extinguished, and the said part or parts so to be awarded, assigned, allotted, and set out to the mayor and commonalty, should be thereafter held by them, exclusively of any manorial rights or interests whatsoever of *G. A. T.* and the other owners and proprietors before mentioned, to be exclusively enjoyed by such freemen of the city residing in *Monk Ward* as aforesaid, as for the time being would have been entitled to right of common, stray or average, in and over the several parcels of land, in case the act had not been passed, and for such and the like cattle, and under such and the like regulations and restrictions as such freemen respectively did or were entitled to enjoy the same. By another act of parliament, passed in the following year, 1818, (the 58 *Geo. 3*,) the commissioners were further authorized and required to lay out and apply certain surplus monies arising from the exoneration of the several parcels of land, the subject of the inclosure, from the right of common, stray or average, to the purchase of a further allotment to the mayor and commonalty, to be for ever exclusively enjoyed by such freemen as aforesaid, in the same manner as their previous rights of stray or average had been held and enjoyed. The commissioners by their award, bearing date 16th day of *January*, 1822, and duly made and published in pursuance of the said acts, did award and allot unto the mayor and commonalty, to be exclusively enjoyed by such freemen of the city residing in *Monk Ward* as aforesaid, as for the time being would have been entitled to right of common, stray or average, in and over the several parcels of grounds by the acts intended to be allotted, in case the same had not been passed, and for such and the like cattle, and under such and the like regulations and restrictions as such freemen respectively did or were entitled to enjoy the same, the following allotments, viz.:—

	A.	R.	P.
An allotment from the common, containing	68	3	0
Another ditto	18	0	18
Another ditto	31	0	0
As purchasers from the devisees of *Thomas Withers*. . .	8	1	20
	126	0	38

The city of *York* is divided into four wards, of which *Monk Ward* is one. The freemen of each of the other wards respectively have rights of common

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or stray and average over certain other several parcels of land, situate near the said several wards respectively, in the same manner as the freemen of *Monk Ward* had and have over the lands in question. By the ancient and immemorial custom of the city of *York*, a wardmote court of the lord mayor and aldermen is held annually, at which court four officers are appointed for each ward, who are called pasture-masters, and who adopt and enforce the necessary restrictions and regulations under which the freemen of the several wards exercise their respective rights of stray and average. The pasture-masters perform the duties of their office with the assistance and under the superintendance of certain other officers called wardens. The lord mayor and aldermen are *ex officio* wardens of the wards, and the custom is, for three of the aldermen to act as wardens of each of the said wards severally, the lord mayor being, during the year of his mayoralty, a warden of all the wards. In matters of more than ordinary importance, relating to the several rights of stray, reference is made by the several wardens to the select body of the corporation called the upper house, and consisting of the lord mayor, aldermen, sheriffs, and those who have been sheriffs, who possess a general control over the wardens and pasture-masters with respect to the several rights of stray. Pasture-masters have accordingly been annually appointed for *Monk Ward* since the passing of the acts of parliament, in the same manner as before, who, together with the wardens of *Monk Ward*, have, both before and since the acts and inclosure, appointed a person to be herdsman. The pasture-masters direct all the repairs of gates, fences, bridges, and the like. The herdsman's duties are to look after the cattle of the freemen, impound any found trespassing or depasturing, contrary to the regulations and restrictions adopted by the pasture-masters, and to prevent cattle straying, and the like. The herdsman resides on the lands, in a cottage built for him thereon by the pasture-masters, and for which the herdsman, in all assessments previously to the one in question, has been assessed to the poor-rates; but these assessments have invariably been paid by the pasture-masters for the time being. The wages of the herdsman, and all other necessary expenses attendant upon the care and management of the *Monk Ward Stray*, were before, and are since the passing of the acts of parliament and the inclosure, defrayed by means of an annual sum, paid by such freemen of the ward as aforesaid, for each head of cattle depastured; the amount of the sum so paid has always been from time to time fixed by the said pasture-masters, and paid to them by the freemen. That sum has varied, according to the amount of the annual expenses, from 7*s.* to 15*s.* for each head of cattle per annum, but during the year 1834, and for the six or seven years preceding, 10*s.* only has been paid annually for each head of cattle turned upon *Monk Ward Stray* by the freemen to the pasture-masters. The said pasture-masters have always rendered every year an account of their receipts and disbursements in respect of the *Monk Ward Stray* to the wardens of the ward, by whom such accounts have been regularly audited. The wardens themselves do not either receive or pay any money whatsoever on account of the *Monk Ward Stray*, nor turn any cattle thereon, nor derive any benefit whatsoever therefrom, nor do the mayor and commonalty of the city of *York* receive any money whatsoever on account of the *Stray*, nor turn any cattle thereon, nor derive any profit or benefit whatsoever therefrom in their corporate capacity,

nor in any other manner, except as any of them may be entitled as such freemen of *Monk Ward* as aforesaid. During several years subsequently to the passing of the acts and the inclosure of the allotted lands called *Monk Ward Stray*, large expenses were incurred by the pasture-masters in the necessary annual expenses of maintaining and improving the same for the exclusive enjoyment of the freemen; and for the purpose of raising funds requisite for such expenses, without imposing heavy burdens on the freemen, the wardens and pasture-masters did from time to time lease certain portions of the allotted lands to different persons for short terms of years, at adequate rents reserved to them the wardens and pasture-masters; but no such leases have existed since 1829, the rents so reserved and received during the existence of the leases amounting in the whole to at least the sum of 2000*l.*; and all other monies received by the pasture-masters on account of the *Monk Ward Stray* have been laid out in the necessary annual expenses of maintaining and improving the *Monk Ward Stray*, except that in the year 1826, the pasture-masters having a balance in hand exceeding 1000*l.*, which did not seem to be then wanted for those purposes, the sum of 498*l.*, part of it, was laid out in the purchase of about five acres of old inclosed land belonging to Mr. *Peter Theakstone*, and lying contiguous to *Monk Ward Stray*, in the township, which five acres were accordingly conveyed by indentures of lease and release, dated the 27th and 28th *September*, 1826, to the individuals who were at that time wardens and pasture-masters of *Monk Ward*, and to their heirs, as trustees for the freemen, and for their exclusive enjoyment; and the said five acres were accordingly added to, and now form part of *Monk Ward Stray*, and are enjoyed by the freemen in the same manner as the rest; and also the sum of 279*l.*, other part of the balance, was expended in building a cottage for the herdsman, and in erecting a penfold upon and for the purpose of the said *Monk Ward Stray*. Before the acts of parliament and inclosure, neither the mayor and commonalty, nor the pasture-masters or wardens, nor the freemen of *Monk Ward Stray*, nor any other persons, were ever rated to the poor in respect of the common of pasture and rights of stray or average over the lands, the subject of the acts and inclosure; nor were such parts as formed the open and uninclosed common called *Heworth Moors*, from which the said 117 acres, three roods and eighteen perches were allotted to the corporation, and now forming part of *Monk Ward Stray*, ever the subject of rate, but the allotment of eight acres, one rood, and twenty perches to the mayor and commonalty, as purchasers from the devisees of *Thomas Withers*, was rated and paid rates to *Heworth* township previously to the purchase and allotment. Since the acts and inclosure and allotment, no rate has ever been paid to the township in respect of *Monk Ward Stray*, by either the mayor and commonalty, or the wardens, or the pasture-masters, or the freemen of *Monk Ward*, but during the continuance of the leases above-mentioned, the lessees or occupiers thereunder for the time being were assessed towards the relief of the poor in *Heworth* township, the rates in respect thereof being always paid by the pasture-masters, and also the five acres purchased of *Peter Theakstone*, as above-mentioned, were, previously to the purchase, rated and paid rates to *Heworth* township. The freemen of the city of *York*, who are occupiers of houses within *Monk Ward*, have since the acts and inclosure had, in the manner above-mentioned, the exclusive enjoyment of the lands in question so allotted and

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purchased as aforesaid, called *Monk Ward Stray*, subject to the same restrictions and regulations under which they previously exercised and enjoyed their rights of stray or average, so far as the same restrictions and regulations were not rendered inapplicable by the inclosure, and in the exercise and enjoyment of the rights, the freemen did, during the year 1834, turn upon the *Monk Ward Stray* their cattle to the number of 200 head. In auditing the accounts of the pasture-masters by the wardens, the balance has generally been in their favour, though in two or three years, on account of the extraordinary expenses, the balance has been against them; but in either case the balance has always been carried forward to the account of the succeeding year. The ordinary expense of the care and management of *Monk Ward Stray* does not however at present exceed 50*l.* a-year. The lands adjoining *Monk Ward Stray*, and before the inclosure forming part of *Heworth Moor*, have since their inclosure let at rates varying from 3*l.* to 5*l.* an acre, as the same are remote from or near to the city of *York*; and the 131 acres 28 perches of land, comprised in *Monk Ward Stray*, are as pasture-land worth to let by the year from 27*s.* to 3*l.* an acre, and would, in their present condition, let for an entire rent of at least 250*l.* by the year; but the right of common of pasture, and right of stray or average, exercised by the freemen over *Monk Stray*, by turning on yearly about 200 head of cattle, is worth, for every head of cattle, to each freeman turning upon the same, at least 2*l.* by the year. The questions to be submitted to the Court of *King's Bench* are, first, whether, under the circumstances above stated, there is such a beneficial occupation of the lands called *Monk Ward Stray*, or any part thereof in the mayor and commonalty of the city of *York*, as to render them liable to the rate; secondly, if there be such a beneficial occupation in the mayor and commonalty, in what amount ought they to be rated? This case was argued in *Michaelmas* Term last (*a*).

Cresswell and *Alexander*, in support of the order of sessions.—The fee simple of these lands is vested by the act of parliament in the mayor and commonalty, and they occupy the lands by the freemen of *Monk Ward*. Both the warden and the pasture-masters are the appointed servants of the corporation, and all their acts are the acts of the corporation. The exclusive right which the freemen of *Monk Ward* enjoy, is not a right to the soil, but is nothing more than a mere right of common, of which they could not be enfeoffed, as it does not lie in livery. It is liable to various restrictions from the corporation. It is therefore clear that the freemen are not rateable. This case is not distinguishable from *Rex* v. *Tewkesbury* (*b*), *Rex* v. *Sudbury* (*c*), *Rex* v. *Churchill* (*d*). As to the case of *Rex* v. *Watson* (*e*), the facts of that case differ from those found here, and *Bayley*, J. expresses his disapproval of the principle there laid down when giving judgment in *Rex* v. *Sudbury* (*c*). The corporation are also beneficial occupiers. The money collected is paid to their officers, the pasture-masters, who have no power to dispose of it, since their accounts are audited by the wardens, and the wardens are subject to the control of the select body of the corpo-

(*a*) Before Lord *Denman*, C. J., *Patteson*, J., *Williams*, J., and *Coleridge*, J.
(*b*) 13 East, 155.
(*c*) 1 B. & C. 389.
(*d*) 4 B. & C. 750.
(*e*) 5 East, 480.

ration. It does not appear that the corporation are bound to apply the money so received to the advantage of *Monk Ward*. However, if they are, the case still falls within the principle of *Rex* v. *Tewkesbury* (*a*). It is more reasonable also to rate the corporation, because of the difficulty, amounting almost to an impossibility, to rate the commoners, some of whom turn in their cattle for a month or a week only.

Bliss, contrà.—It is doubtful whether the appellants are the actual occupiers; but if they be, their occupation is clearly not beneficial. As to the actual occupation, the land is not all in the same predicament. To prove them occupiers of the five acres purchased of *Theakstone*, no argument is suggested that is not equally applicable to the 126 acres; but the argument most insisted on for the 126, viz. the title being in the corporation, has no application to the five acres; but, on the contrary, is as good to prove the trustees occupiers of the five acres as the corporation occupiers of the 126. All the other arguments and circumstances to prove an occupation are insufficient apart from the title, because they all existed in the same force as to the 126 acres in 1816, when the corporation must be admitted to have had neither title nor occupation. These five acres, therefore, at all events should be struck out of the rate. As to the actual occupation of the 126 acres, the acts of parliament and the award may have made the freemen householders of *Monk Ward*, tenants in common from year to year of the sole and separate pasture, which is an occupation; *Rex* v. *Watson* (*b*). The judgment in *Rex* v. *Churchill* (*c*) turned upon the burgesses and householders having only a right of common and not a sole and separate pasture, which they, not having succession, could not by the common law have prescribed for. That difficulty does not exist here, for an express statute has given the former commoners the exclusive enjoyment of the pasture, extinguishing the rights of all others. As to the beneficial occupation, the rule to be collected from all the cases seems to be this:—that where the occupier actually receives the profits, either for his own use or the private use of others, though he have no interest in them himself, he is rateable, as in *Rex* v. *Tewkesbury* (*a*), *Rex* v. *Sudbury* (*d*), *Rex* v. *Agar* (*e*), *Rex* v. *St. Giles, York* (*f*). But no occupier is rateable who does not actually receive the profits himself, and to an extent exceeding the expenses of care and management, as if there be no profits; *Rex* v. *Bedworth* (*g*); or if the benefit or profits be immediately enjoyed by others; *Rex* v. *Waldow* (*h*), *Rex* v. *Woodward* (*i*), *Rex* v. *St. Luke's* (*k*), *Rex* v. *St. Bartholomew the Less* (*l*); which cases depend neither upon the ground of charity, for even alms-folk are not therefore exempt from rates; *Rex* v. *Munday* (*m*), *Rex* v. *Green* (*n*); nor upon the appropriation of the profits to any public purpose, which must be by act of parliament, and for all subjects generally, in order to create an exemption; *Rex* v. *Salter's Load Sluice Navigation* (*o*), *Rex* v. *Liverpool* (*p*).

(*a*) 13 East, 155.
(*b*) 5 East, 480.
(*c*) 4 B. & C. 750.
(*d*) 1 B. & C. 389.
(*e*) 14 East, 256.
(*f*) 3 B & Ad. 573.
(*g*) 8 East, 387.
(*h*) Cald. 358.
(*i*) 5 T. R. 79.
(*k*) 2 Burr. 1053; 1 W. Bla. 249.
(*l*) 4 Burr. 2435.
(*m*) 1 East, 584.
(*n*) 9 B. & C. 203.
(*o*) 4 T. R. 730.
(*p*) 7 B. & C. 61.

In these cases also the occupiers had some benefit from the tenements, for their servants resided there; but this being only for care and management, does not form the subject of rating; *Rex* v. *Joddrell* (*a*), and the cases there cited. The facts found by the sessions bring the present case fully within this rule. It is expressly found that the corporation derive no benefit whatever from these lands. The special facts stated are to be qualified by this finding. But those special facts, even independently, are no evidence of a beneficial occupation. It can never be held that the enjoyment of these freemen is the enjoyment of the corporation. The corporation is not seised to its own use. It can neither put cattle on the land, nor authorize others to do so; as in *Rex* v. *Sudbury* (*b*) and *Rex* v. *Tewkesbury* (*c*). All freemen are not commoners, but only a portion, who are householders in a particular ward. These individuals are not the body corporate, nor do they hold or enjoy by its permission, or in its name and stead, but by a paramount right, and exclusive of the body corporate as well as all others. If the corporation be seised of any lands for a charitable use, as in *Rex* v. *St. Luke's* (*d*), it could have been said with more reason, that the enjoyment by the charitable objects is the enjoyment by the corporation. The head-money or annual payment to the pasture-masters is not agistment money, nor the hire and price for enjoyment, but is in its origin and character a corporate regulation for the more convenient enjoyment of the freemen, and depends for its authority on the custom only, not on any proprietary title or occupation of the corporation. The powers also and duties of the pasture-masters and other officers rest upon the same foundation, for the same payments are made and powers exercised through the other wards of *York*, where there appears no question of title or occupation; the same are still made and exercised over the five acres, where it does appear there can be no title; and the same were formerly held and exercised over the 126 acres, in which it appears that till 1817 the corporation could have had neither title nor occupation. The annual payments, therefore, are no return of profits from the lands, but a customary collection in advance to defray the costs of care and management, which they neither can by law nor do in fact exceed; and, consequently, are by their nature and amount exempt from rates. With regard to the balance in hand in 1826, arising from leases then granted, during their continuance there was of course a beneficial occupation in somebody, and then rates were paid; but that balance has been all expended, and all, with the exception of the purchase of the five acres, in the necessary care and management; and as the leases expired in 1829, those circumstances can have no effect to prove a beneficial occupation of the corporation in 1834; for both the leases and the purchase were unauthorized acts uncommanded by the corporation, unwarranted by the custom, unsanctioned by the statutes of allotment, and can never be repeated. In *Rex* v. *St. Giles, York* (*e*), the balance was still accumulating, and accrued by acts within the power of the trustees to do. As to the balance of 50*l.* now in hand, even if this were the clear profits, the rate must at least be reduced to that amount. But this balance is of the same nature as the annual payments from which it accrued. A balance must be taken *communibus annis; Rex*

(*a*) 1 B. & Ad. 403.
(*b*) 1 B. & C. 389.
(*c*) 13 East, 155.
(*d*) 2 Burr. 1053; 1 W. Bla. 249.
(*e*) 3 B. & Ad. 573.

v. Hull Dock Company (*a*). It is not every year against the corporation, but sometimes in their favour, and in either case is carried forward to the next year's account, and expended for care and management. If there continue to be a surplus, the head-money will, by the custom, be reduced. In the instance of houses, there must be always a balance accumulating a fund for renewal; but that fund is not rateable; *Rex* v. *Joddrell* (*b*). The present is like an attempt to rate the lord of a manor for the rights of common in his customary tenants over his waste; whereas a deduction equal to that burthen ought to be made from his rate; *Kempe* v. *Spence* (*c*); and where the rights of others over an occupier's land eat up the whole benefit, he is not rateable at all; *Lord Bute* v. *Grindall* (*d*). Here it is found that the land would let for 250*l.* a year, but that the rights of common are worth 400*l.* a year. Every thing in the case negatives the existence of any possible benefit over and above the rights of the commoners. The rule for ascertaining the rateable amount where the owner is occupier, is to inquire what a tenant would give to occupy in the same manner, and subject to the same burthens; *Rex* v. *Lower Mitton* (*e*) and that class of cases. Suppose the corporation were to demise this land, what rent could a tenant be found to give? The householders of *Monk Ward* would still have their rights of common, and the tenant would perhaps not get their head-money, for that is due only by the custom of the corporation, and the custom is not demisable; but even if he did get those payments, he could only claim them to the amount of the necessary expenses of care and management, for the custom extends no further. The only profits of this land are the pasture; of that pasture the commoners have the exclusive enjoyment by the statute; subject to that enjoyment, what rent could the corporation get for this land from a tenant?

Cur. adv. vult.

Lord DENMAN, C. J. now delivered the judgment of the Court as follows. —From the statement of the case, it appears in substance, that before the passing of an act of parliament in 1817, (57 *Geo.* 3,) the freemen of the city of *York*, who were occupiers of houses in one of the wards called *Monk Ward*, were entitled to the right of stray and average over a parcel of ground called *Heworth Moor*, and some other parcels of ground, of which certain persons in the said act named were seised in fee, and by the said act commissioners were empowered to extinguish the said right of stray and average, and to assign in lieu thereof a parcel of land to the mayor and commonalty of the city of *York*, free of all manorial rights, to be exclusively enjoyed by such freemen of the said city as were before entitled to such, the right of stray and average before mentioned, and in the same manner as the said right of stray and average was enjoyed. The said commissioners, by their award, bearing date the 16th *January*, 1822, did accordingly set out to the said mayor and commonalty 117 acres, 3 roods, and 20 perches, which, together with 8 acres, 1 rood, and 20 perches, and 5 acres, (which fall under a different consideration from the rest,) amounting to 131 acres and 28 perches of land, form the subject of the present rate. These lands, it is stated, are worth 250*l.* a year to let; but in the exercise of the said right of stray and

(*a*) 5 M. & S. 394.
(*b*) 1 B. & Ad. 403.
(*c*) 2 W. Bla. 1244.
(*d*) 1 T. R. 338.
(*e*) 9 B. & C. 810.

average by the said freemen, 200 head of cattle are yearly turned on the said lands, and the right in respect of each head of cattle is worth 2*l.* a year. It must be observed therefore in passing, that there exists in this case property clearly rateable in its nature, although it may still turn out upon the further examination of the case, either that no person is rateable, or, as has been contended, that at all events the mayor and commonalty are not rateable. It further appears from the statement, that for the regulation of the rights of the freemen of *Monk Ward*, officers are appointed at the wardmote of the mayor and aldermen, called pasture-masters, who are themselves subject to other officers called wardens, of whom the lord mayor is always one, the rest being aldermen. Then follows the statement upon which the whole question turns, "that the said mayor and commonalty receive no money on account of the said stray, nor turn any cattle thereon, nor derive any benefit in their corporate capacity, nor in any other manner, except as any of them may be entitled as such freemen of *Monk Ward* as aforesaid." Founded upon this statement, the argument addressed to us has been, that whatever may be the case with the individuals deriving benefit from turning cattle on the lands in question, the corporation is not rateable; and in support of it various cases have been cited, which, whether distinguishable from the present or not, (we think they are,) furnish instances of exemption from rateability. The cases referred to were *Rex* v. *St. Luke's Hospital* (*a*), *Rex* v. *Field* (*b*), *Rex* v. *St. Bartholomew's Hospital* (*c*), *Rex* v. *Waldow* (*d*), *Lord Amherst* v. *Lord Somers* (*e*), and *Rex* v. *Salter's Load Sluice Navigation Company* (*f*); to which latter might have been added *Rex* v. *Scolcoates* (*g*), *Rex* v. *Liverpool* (*h*), and *Rex* v. *Trustees of the River Weaver*, in a note to the same case. Of these cases the last-mentioned seem to have the strongest bearing upon the present; the others very slightly, if at all resembling it; the hospitals and the charitable institutions, which were the subject of consideration in the cases first alluded to, are wholly distinguishable from one where, beyond dispute, rateable property is beneficially occupied. In *The King* v. *St. Luke's Hospital* (*a*), and *The King* v. *Field* (*b*), an attempt was made to rate persons occupying apartments for the purposes of the establishment in each instance, but the attempt failed, with some warmth of expression on the part of Lord *Kenyon* in the latter case, because the residence of the persons being necessary, and there being no accommodation beyond that necessity, it must be considered on the same footing as that of the unhappy inmates in the one case and the charity children in the other. The cases of *Rex* v. *St. Bartholomew's Hospital* (*c*), and *Rex* v. *Waldow* (*d*), fall under the same consideration. In the case of *Lord Amherst* v. *Lord Somers* (*e*), the only point decided was, that the occupation of property for the public service cannot become the subject of a rate; and such was the case there, because the property in question (stables) was applied to the use of a regiment of horse guards exclusively, the plaintiff not having had a single horse kept in it. It is to be observed, however, that when in any case the accommodations are more than requisite for the due

(*a*) 1 Burr. 139, 3d ed.; 2 Burr. 1053.
(*b*) 3 T. R. 387.
(*c*) 1 Burr. 139; 4 Burr. 2435.
(*d*) 1 Burr. 198; Cald. 334.
(*e*) 2 T. R. 372.
(*f*) 4 T. R. 730.
(*g*) 12 East, 80.
(*h*) 7 B. & C. 61.

performance of public duty, such extra occupation is rateable; *Rex* v. *Terrott* (*a*). The case of *Rex* v. *Salter's Load Sluice Navigation Company* (*b*), which is the foundation upon which the others above referred to rest, if this subject had now for the first time been considered, might have created some doubt in the present case; for it is certainly true that Lord *Kenyon* in his judgment, and indeed very much as the reason for it, relies upon the fact that the parties rated "were bare trustees without any interest," and he refers to the case of *Rex* v. *St. Luke's Hospital* (*c*) as similar in principle. The cases of *Rex* v. *Inhabitants of Liverpool* (*d*), and *Rex* v. *The Trustees of the River Weaver* (*e*), may be considered as depending upon that case. In *Rex* v. *Sculcoates* (*f*), there was the further difficulty, that no profit appeared to arise in the place where the rate was imposed. In these cases, however, the tolls or dues received were by the acts of parliament in each case directly applied to certain specific purposes, and diverted from the control and management of the trustees. Neither the trustees nor any body else derived any benefit from the money received. They, therefore, (the trustees,) in each of those cases neither derived any benefit nor could be considered as trustees for others who did; a circumstance which distinguishes those cases from this now under consideration. But if the authorities to which we have lastly been referring had borne more directly upon the present case, and had admitted of still less distinction, it would have been impossible to have acted upon them without overturning others equally well considered, as we think, and decided upon this very subject; and we are clearly of opinion, when we bear in mind the importance of abiding by those decisions when once made and recognized, so that a corresponding practice may probably have grown up through the country, and, moreover, consider the ease and convenience of this mode of rating, when compared with the assessment of the individuals benefited, that we ought not, except under the pressure of the strongest arguments and the clearest reasons, to depart from what has been decided and done already. We shall doubtless be understood as now alluding to the cases of *Rex* v. *The Trustees for the Burgesses, &c. of Tewkesbury* (*g*), and *Rex* v. *Mayor, &c. of Sudbury* (*h*), cited in the argument, and from which we think the present case cannot substantially be distinguished. In the former case the rate was imposed upon the trustees of the *Severn Harn*, a meadow in the borough of *Tewkesbury*, over which, before the passing of an act of 48 *Geo.* 3, the burgesses and certain occupiers within the borough had a right of common for a portion of the year. By the said act this right was suspended, and the aftermath, over which the said right had been exercised, was vested in trustees, who were empowered to let the aftermath, and they had taken in cattle to agist at so much a head. The profits were to be divided amongst those persons who would have been entitled to right of common before the passing of the act. The trustees, therefore, in that case received no benefit; but this Court held that they were properly rated. In the latter case the rate was upon the mayor, aldermen, and burgesses of *Sudbury*, in respect of a piece of pasture land called *Portman's Croft*. There also, as in the present instance, the

(*a*) 3 East, 506.
(*b*) 4 T. R. 730.
(*c*) 1 Bott, 132; 2 Burr. 1053.
(*d*) 7 B. & C. 61.
(*e*) 7 B. & C. 70.
(*f*) 12 East, 40.
(*g*) 13 East, 165.
(*h*) 1 B. & C. 389.

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land was vested in the corporation, and the enjoyment of it resembled in many particulars what takes place with respect to the land in question. Persons entitled to turn on cattle paid a stipulated fine, according to regulations from time to time made, for each head of cattle. This payment was made to the treasurer of the corporation, and the profits, after deductions, were distributed among poorer burgesses, who had, but did not on account of poverty, exercise a right of depasturing cattle. In that case, therefore, the trustees received money, not for their own use or benefit, but expressly for the benefit of others. This Court, however, fully approving of and acting upon the authority of the case of *Rex* v. *The Trustees for the Burgesses of Tewkesbury* (*a*), confirmed the order of sessions confirming the rate made upon the corporation. The case of *Rex* v. *Watson* (*b*) was then, as it has now been, strongly pressed in argument; but it was there distinguished, and we think properly, because in the case of *Rex* v. *Watson* (*b*) the decision proceeded upon the ground that the temporary ownership seemed to have been given up to the three persons mentioned in that case, and that therefore they were properly rateable, as the exclusive occupiers of a certain portion of the land. The occupation of the appellants, though not the same precisely, is similar to that in the two cases cited. The pasture-masters are appointed at a court of the mayor and aldermen. The wardens are the mayor and three aldermen. The pasture-masters regulate the enjoyment of the stray, and direct the repairs of bridges, gates, and the like; they hire a herdsman, and have paid the poor-rate for the house in which he lived. It also appears, that during the time that the stray or part of it was let to tenants, such tenants were assessed to the poor-rates, and the same were paid by the pasture-masters. Upon the whole, we are of opinion, that the mayor and commonalty of the city of *York* are properly rated for the relief of the poor in the township of *Heworth*, within which the lands lie, except as before mentioned, the five acres mentioned in the case, which are not like the rest vested in the corporation, and from an assessment from which they ought to be relieved by an amendment of the rate in that respect. The question of amount is entirely for the sessions.

Order of Sessions confirmed.

(*a*) 13 East, 155. (*b*) 5 East, 480.

The KING *v.* PAYN, Treasurer of the County of BERKS.

January 30.

1. *Mandamus* lies to the treasurer of a county to compel him to deposit with the clerk of the peace, pursuant to 12 *G.* 2, c. 29, books containing a statement of the accounts and balances between himself and the county, although the materials for those accounts, tradesmen's bills, &c., and his vouchers, have already been deposited, and although such books contain his acquittances by the magistrates, and are his only means of proving his discharge; and although he has already delivered the books in to the justices, and they have returned them to him; and although they may contain other matters relating to other persons.

2. A rule for a *mandamus* will be made absolute if enough remains unanswered to warrant it, even although there has been wilful misrepresentation and suppression of facts in the affidavits on which the rule *nisi* has been obtained.

SIR *J. CAMPBELL*, A. G., had obtained a rule calling upon *William Payn*, Esq., treasurer of the county of *Berks*, to show cause why a writ of *mandamus* should not issue, commanding him to deposit with the clerk of

the peace of that county the two books containing his true and exact accounts of the sums of money respectively received and paid by him as treasurer, from the date of his appointment, which accounts had been passed by the justices at quarter sessions. The rule was obtained upon affidavits by certain justices for the county, (one of whom was a member of a finance committee appointed by the justices from among their body,) stating that *Payn* was appointed treasurer in the year 1822, and that from the early part of 1825, until the *Epiphany* Sessions, 1836, he had produced to the finance committee every sessions a book containing an account, which he represented to be a true account of the sums of money received and paid by him, distinguishing the particular use to which each sum had been applied during that time. That two books in all had been so successively produced, one down to 1833, the other since then: that he also produced and laid before the justices at sessions certain vouchers for such payments, whereupon, after such examination as the justices thought proper, the accounts had been passed, and the books, as well as the vouchers, had been returned to him: that up to the *Epiphany* Sessions, 1836, no other accounts had been delivered or passed: that none of these accounts nor either of the books had been deposited with the clerk of the peace, nor were they found among the records of the county: that from the date of his appointment up to *July*, 1825, the treasurer published an annual abstract account of his receipts and payments; but that since then, in lieu of such annual account, he had, pursuant to an order of the Court of Quarter Sessions, published quarterly accounts of the same nature in the *Reading Mercury* newspaper, and that a copy of such abstract accounts had been from time to time deposited with the clerk of the peace, together with certain vouchers relating to the disbursements contained in such abstract accounts. The affidavits also stated that one of the deponents, upon examination, believed these accounts to be incorrect: that the treasurer himself disclaimed being bound by them, and that it was impossible to understand the abstract accounts unless an opportunity was afforded of comparing them with the books and the vouchers, and that the deponents had applied to the treasurer for an inspection of the accounts passed in the books, but had received no answer; and that they had requested him to deposit them or deliver them in to the justices at sessions, but that he had not done so: that since *Michaelmas*, 1835, accounts have been delivered for each current quarter, and that the price of the books had, as they believed, been charged to the county, and that they were still in the possession of the treasurer. The affidavits in answer stated, that these books contained entries of the sums received and paid by him as treasurer, showing the balance due to or from the county at the last quarter sessions, and an account furnished by the clerk of the peace of the sums levied and ordered to be paid to him for county rates during the last quarter, and an account by the clerks of the petty sessions of all fines received on summary convictions during the last quarter, and that the accounts and orders for payment of all sums paid by the treasurer during the last quarter, and the vouchers for the same when paid, were delivered by him to the committee: that the justices, after having examined the accounts, signed the book, adding, that they had audited and passed the accounts, and stating the balance: that after the book had been so signed, it was returned to the treasurer, and the vouchers were deposited with the clerk of the peace: that

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three-fourths of one of the books consisted of the accounts of *Payn's* deceased father, who had preceded him as treasurer: that they were *Payn's* own property, contained his acquittances, and were the only means he had of proving his discharge: that the whole matter had been considered and discussed by the justices at sessions, who had determined that he should not be called upon to deposit the books, and that he had already sufficiently discharged his duty by rendering the accounts referred to, and that those were the accounts contemplated by the statute (*a*). It was also denied that there had been any improper application of the money, and it was stated that various circumstances had been wilfully suppressed, and gross misrepresentations made by the affidavits on the other side.

Talfourd, Serjt., *Thesiger*, and *T. F. Ellis*, now showed cause.—The Court will not grant a *mandamus* in this case. The treasurer has already discharged his duty; he has delivered in the accounts required by the statute, and those accounts are in the proper custody. The books are not the accounts themselves; the sessions were satisfied with the accounts which were delivered in, and the Court will not interfere with the exercise of their discretion. These very books were themselves delivered in to the justices, and by them returned. The duty of the treasurer therefore having been discharged, the default, if any, exists in the sessions only, and to them, if at all, the *mandamus* should be addressed. Next, the affidavits are filled with gross misrepresentations, which are denied by the affidavits in answer. The *Attorney-General* also, in moving for the rule, stated that the reason given by the sessions for their non-interference was, that they were *functi officio*. The affidavits show that such was not the fact. The practice of the Court is, to discharge a rule when it has been obtained under a misstatement of facts. But *mandamus* is not the proper remedy, even if it be assumed that these are the accounts contemplated by the statute. The duty of the treasurer is ended, and he now holds these books in his individual capacity, and the Court will not issue this writ to compel him any more than any other individual who might happen to be possessed of them to deposit them, since it is no longer part of the duty of his office. A *mandamus* does not lie to prevent tort generally; *The Queen* v. *Peach* (*b*). In *Rex* v. *The Commissioners of Customs* (*c*), the Court said they would not allow *mandamus* to be substituted for trover. There are many cases where the Court has refused to issue a *mandamus* against a county treasurer, because his office is merely ministerial; he is merely the servant of the county; the proper remedy for any neglect or misfeazance on his part is by indictment; *Rex* v.

(*a*) Stat. 12 *G.* 2, c. 29, s. 7, provides, "That the treasurer shall keep books of entries of the several sums respectively received by him, and shall deliver in true and exact accounts, upon oath if required, of all the sums of money respectively received and paid by him, distinguishing the particular uses to which such sums have been applied, to the justices at every general or quarter sessions, and shall lay before the justices at such sessions the proper vouchers for the same."

Sect. 8 provides, "That all the accounts and vouchers shall, after having been passed by the justices at their respective general or quarter sessions, be deposited with the clerk of the peace for the time being, who is required to keep them among the records of the county, to be inspected from time to time by any of the justices within the limits of their commission, without fee or reward."

Sect. 9 provides, "That the discharges of the justices, or the greater part of them, by their orders made at their respective quarter sessions to such treasurer, shall be sufficient acquittances in any Court of law or equity," to all intents and purposes whatsoever.

(*b*) 2 Salk. 572.

(*c*) 2 Har. & Wol. 247; 1 Nev. & Per. 536.

ristow (a), *Rex* v. *The Treasurer of Surrey* (b), *Rex* v. *Johnson* (c), *Rex* v. *eyes* (d); and where that remedy fully exists, the Court will not grant a *andamus*.

Sir *J. Campbell*, A. G., and *Robinson*, who were to have argued in support f the rule, were not called upon.

Lord Denman, C. J.—I am of opinion that this rule ought to be made bsolute. It appears, that either from mistake or some other cause, the essions and treasurer have both done wrong; the one in not requiring the ccounts to be deposited with the clerk of the peace, and the other, in detining them afterwards from the clerk of the peace. I entirely disclaim ntering into the merits of the parties on either side, it is enough for me to ay, that a great public duty is left unperformed by reason of a public officer eeping back documents, which he made, and, I think, keeps in that chaacter. It is quite clear that the book of entries was an account-book; it is qually clear it was an account passed by the justices in sessions, and the reasurer having delivered it in, had no right to take it away. The sessions ad no right to place it in his hands, nor had he any right to keep it. The ublic are represented, not merely by the justices who happen to be present t the sessions, but by any justice of the county. The act of parliament ives every individual justice of the county at all times a right to see all the ccounts that are passed by the justices at sessions. An application has een made by some justices of the county to have an opportunity of inpecting accounts which were passed by the justices at sessions, and whatver their motives may be, whatever the question may be between them and he treasurer individually, we think we are bound, under the circumstances, o enforce by *mandamus* their right to inspect these accounts. Is it to be aid that the public and the county are to be deprived of the advantages of hat inspection because the treasurer chooses to have his vouchers written n those same accounts? That cannot alter the nature of them, and I think t is quite a mistake to say that these are private books. They are public ooks. If he has written his accounts in books in which he had an interest s a private individual, the fault is his own. If he has introduced them into book belonging to his father's executors, he has done what he had no right o do with respect to them. I entirely disclaim all interference with any of he former cases, for they are totally inapplicable. In *Rex* v. *Jeyes* (*d*), an rder was made at the assizes by the judge who tried the prisoner, that the xpenses should be allowed. The treasurer in that case ought to have paid hem, but did not; and this Court refused the *mandamus* on this ground,— hat he was only the servant of the justices, who ought themselves to comel their own servant to do his duty. But in this case, where the sessions and reasurer have both committed a mistake, and the treasurer has done that which the act expressly prohibits his doing, I think we should not discharge he duty we owe to the public were we not to make this rule absolute.

Williams, J.—I am of the same opinion. The only doubt which weighed with me was, whether this *mandamus* was addressed to the right party. It

(a) 6 T. R. 168.
(b) 1 Chit. 650.
(c) 4 M. & S. 515.
(d) 3 Ad. & Ell. 416; 1 Har. & Wol. 325.

was suggested that it should go to the sessions, as it was their duty, when the book was before them, to have detained it in their custody, and placed it among their records on the file of their Court. It has also been argued, that the treasurer is an officer against whom an indictment would lie, and *The King* v. *Bristowe* has been cited; but in that and in the other case referred to by my lord, there was an order for the payment of a sum of money, and by consequence, upon the refusal to obey it, an indictment would have lain against the party; and Lord *Kenyon*, when refusing the *mandamus*, expressly grounds himself on the circumstance that there was a remedy by indictment. But how does the matter stand here? The Court of Quarter Sessions have returned this book. They refuse to make an order on the treasurer, but I am not prepared to say that, after they have returned the books, they possess any power to make such an order. If so, they are not the persons to whom the *mandamus* should be addressed. Is not *Payn* then the person to whom it should be addressed? Certainly, this book is within the precise language and meaning of the statute. It stands admitted that he has it; and therefore, as it seems to me, there being no grounds for an indictment against him, no remedy that I am aware of can exist unless this writ be issued. Allusion has been made to the hardship upon this person; as to that, I do not entertain, still less express any opinion. However, there is no doubt but that the books will be as safe among the records of the sessions as in Mr. *Payn*'s own chest, in the event of its being necessary for him to discharge himself from any demands.

COLERIDGE, J.—I am of the same opinion on all the three points. In the first place, as to these being the accounts, I think it is hardly possible to doubt for a moment that these really and truly are the *accounts* that the treasurer has kept. They are tendered by him as his accounts, they are received by the magistrates as his accounts, and the discharge is entered on those accounts. Mr. *Ellis* says he did in truth comply with the act, which calls on him to deliver in a true and exact account, when he delivered in what in fact were only the materials for the accounts, that is to say, sums which he received, as appears on the face of the county rates, the tradesmen's bills, the gaoler's accounts, and the different vouchers he had for the sums paid. Those are the materials for the accounts, and the delivery of them certainly is not a compliance with the statute. The word "accounts" is to be understood in the statute in the ordinary sense; the party is not merely to cast before the magistrates all his bills and vouchers, he is to present them with a clear and true statement of his receipts and payments. I have no doubt on that point. With regard to the point made by Mr. *Ellis*, that this affidavit contained misrepresentations and suppression of material matters, still, if enough remains unanswered to satisfy the Court that the rule should be made absolute, we must proceed on such part of the affidavit. This is not like a case of application for a criminal information; we are now to say on these facts, whether or not this public duty is to be performed by a public officer. The only thing that has created a difficulty in my mind is the third point of the case, whether or not a mandamus was the proper course to be taken here. A great many cases have been cited, but I think the result of those cases is nothing more than this; that when the Court finds that a public officer has a master, and that he has received an order from that master, or

from any public authority competent to issue the order, and finds also that the disobedience to that order may be punished by indictment, then it will not issue a *mandamus* to compel the performance of that order. That is not because the situation of the officer may be low, but because the character he fills is ministerial only; and he has received an order from a competent authority which he is bound to obey, and in case of default, may be proceeded against by the common remedy of an indictment. The disobedience to the order is a misdemeanor, and a *mandamus* is therefore not needed. In this case the sessions, whose servant Mr. *Payn* is said to be, have issued no order; there is no order for disobedience to which an indictment could be found. This distinguishes the present case from the cases cited. The question then with me was, there being no existing order, whether the first step should not have been for this Court to issue an order to the sessions to make an order, and then that such order, if it was not obeyed, should become the foundation of an indictment. I have considered that, and I doubt very much whether, if we were uncertain as to the facts, the proper course for us would not have been to issue such an order. But here it appears by the concurrence of all parties, that the course of proceedings complained of has been going on for a number of years, and we find further, that the sessions having had these books, according to the statute, within their possession for a certain time, have suffered them to get into other custody; and that they neither have made nor intend to make any order. Under these circumstances, it is very doubtful indeed whether this Court has authority to compel them to issue such an order. But where a public officer is in possession of a public document, and the statute says that document shall be deposited in a particular custody, I cannot doubt for a moment that this Court has a right to interfere, and say to that public officer, "Obey that statute, and put that document in the place where it ought to be." That is precisely the present case; for this is a public, not a private document. The moment Mr. *Payn* chooses to keep in this book those accounts which he was to render to the magistrates from session to session, or yearly or half-yearly, as it may be, and has taken his discharge in it as a public officer, he holds it as a public officer, and must deposit it in the proper place. It must be observed, that this Court does not proceed at all on believing that the charges made against Mr. *Payn* have any foundation. As to any inconvenience, there can be none to him, because those documents are deposited in a place of public custody; the only use of them to him would be to evidence his discharge under the statute, and he will always have a right to have access to them, or to compel their production whenever his interest may require.

Rule absolute for a *mandamus*.

* The KING *v.* STANSFIELD.

Where a rule for a criminal information had been discharged on the payment of costs by the defendant:

INDICTMENT. The prosecutor had previously proceeded by way of criminal information against the same party for the same offence. The rule for the criminal information had been discharged upon payment of costs by

Held, that from these circumstances no agreement was to be implied that the prosecutor should not institute any other proceedings, and an indictment having been afterwards preferred by him for the same offence, the Court refused to stay the proceedings under it.

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defendant, and Sir *J. Campbell*, A. G. having obtained a rule for staying proceedings under the indictment,

Sir *W. W. Follett* now showed cause, and contended that this Court had no authority to interfere, and that proceedings could only be stayed by the entry of a *nolle prosequi* by the Attorney-General.

Sir *J. Campbell*, A. G. in support of the rule.—This is like the case of *Moscati* v. *Lawson* (*a*), where, by consent of the defendant, a juror having been withdrawn, this Court held it was a breach of faith to bring a subsequent action, and stayed the proceedings. It clearly was never the intention of the Court that the prosecutor, having received his costs, should commence a subsequent proceeding. He must be considered to have entered into an agreement not to harass the defendant further. That implied agreement was entered into under the sanction of the Court, and the prosecutor having made a previous application relating to the same circumstances, is still within the jurisdiction of the Court to which he applied, and they will not allow him to act in contravention of his agreement.

Per Curiam.—We think that we cannot imply the existence of any such agreement; and as nothing of the kind formed a part of the terms upon which the former rule was discharged, we cannot now interfere.

Rule discharged.

(*a*) 1 Har. & Wol. 572.

The KING *v.* KOOPS.

On an indictment for perjury in an affidavit made in the Insolvent Court, in order to prove that such affidavit was required by the practice of that Court, an officer of the Court attended with a printed copy furnished him by the Clerk of the Rules, of a paper hung up in a room adjoining the Court by its authority, and containing its rules of practice. Independently of the printed copy produced, the witness had no knowledge of the practice, and he had never compared it with the authorized paper:—*Held*, that the practice of the Court had not been proved.

INDICTMENT for perjury, tried before Lord *Denman* at the sittings after Trinity term, 1835. The perjury was alleged to have been committed in an affidavit made in the Insolvent Court. By 7 *Geo.* 4, c. 57, s. 10, it is provided, that any person imprisoned for the causes there recited may, within fourteen days after his imprisonment, apply to the Court in a summary way for his discharge. It is also provided that, if the Court think it reasonable, such application may be made after the expiration of the fourteen days. It is the practice of the Court to allow such subsequent application upon a statement, on affidavits only, as to the cause of the delays, amount of property, &c. In order to prove the practice, *Sturges*, an officer of the Court, whose duty it was to deliver out copies of the rules, was called. He stated, that there was no record of the rules, no official copy, nothing to which the judges have put their hands, &c., or which could be called an original; but that there is hung up in a room adjoining the Court, by authority of the Court, a printed copy. He produced what he believed to be a correct copy, which he had obtained from the clerk of the rules, but he had not compared it with the copy hung up. He was unable to prove the practice orally, unless allowed to refer to the copy produced. The jury found the defendant guilty.

In *Michaelmas* Term, *Humfrey* obtained a rule *nisi* for a new trial, on the grounds, 1st, that the practice of the Court was not properly proved; 2d, that the offence committed was not perjury; 3d, that what was sworn was not a material part of a judicial proceeding.

Erle and *Moody* now showed cause. [As the Court gave no opinion on the two latter points, the argument upon them is omitted.]—The evidence given in this case was admissible. Where the question is as to practice or rules, of which there is no authenticated copy, the mode of proof employed is the proper one, analogously with the mode of proving foreign law when not in writing, *Ganer* v. *Lady Lanesborough* (*a*); although, if in writing, it must be proved by a copy properly authenticated; *Boetlinker* v. *Schneider* (*b*). [*Coleridge*, J. As to the law of a foreign country, that, written or unwritten, may be proved orally.] The practice of the Court of Quarter Sessions is always proved by means analogous to those employed on this occasion; where there are written rules, the Clerk of the Peace produces them, but where the Court only states the rules orally, then any one who is cognisant of them may prove them; and such was the mode by which the practice of the Ecclesiastical Court was proved before Lord *Ellenborough*, in *Beauvain* v. *Sir William Scott* (*c*).

It appears that these printed copies are referred to much in the same way as *Tidd's* Practice is, for the purpose of ascertaining the rules of this Court. Moreover, there is a fallacy in assuming that it is necessary to prove the practice of the Court formally. The only proper inquiry in this respect under the indictment was, whether or not the matter respecting which the perjury was assigned was or was not material. [Lord *Denman*, C.J.—Can it be assumed to be material, without proof of what the practice of the Court is? Where the terms upon which the petition is receivable are in the breast of the Court, they have power to require a statement on oath; but I think it must be shown that such practice has been established.] The question was not as to whether such practice existed; of that there was no doubt, and it was not necessary to prove it formally. The rules were mere intimations to the suitors how they were to proceed. In this Court, even if the forms to be used have been drawn up by the Court, it is the substance only which need be looked to, and perjury is just as much committed, although the formal words are not used, as if they were; and even although in consequence of such irregularity, the affidavit is not admissible for the purpose for which it was intended; *Rex* v. *Hailey* (*d*).

Humfrey, in support of the rule, was stopped by the Court.

Lord DENMAN, C.J.—The evidence adduced in this case was not admissible. It is clear that no jurisdiction existed to administer the oath, except by virtue of the practice of the Court. Mr. *Moody* ingeniously puts it, that such jurisdiction was a necessary result of the provision contained in that 10th section of the act. But that is too much to imply. On the trial it was necessary to prove that the affidavit was required by the practice of the Court. Then comes the question, has that practice been properly proved? I am of opinion it has not. At the trial a clerk was called, who produced a printed paper, which he stated to be a copy of the rules of Court. He himself had no personal knowledge of what those rules were,

(*a*) 1 Peake, N. P. C. 25.
(*b*) 3 Esp. 58.
(*c*) 3 Camp. 388.
(*d*) R. & M. 94; and see *Rex* v. *White*, M. & M. 271.

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and when asked about them, was obliged to refer to the printed paper. There is nothing to induce us to recognize that paper as official, nor was there evidence that it was either the original authorized transcript of the rules, or an examined copy. I think, therefore, that the foundation on which the case rested wholly failed.

WILLIAMS, J.—I am of the same opinion.—Mr. *Moody*, in arguing that the Court had power under the statute to require the affidavit, assumes the whole question; I can find nothing in the act to justify such an assumption. As, then, the affidavit could only be required by the rules of the Court, is there sufficient evidence of what those rules are? The witness could not vouch them from any knowledge of them he himself had, independently of the printed paper produced, which he stated to be a copy of them. That copy, however, was not proved to have been examined with the original. It was not therefore sufficiently made out that the affidavit in question was required by the practice of the Court.

COLERIDGE, J.—It appears that the defendant presented his petition to the Court, and that his petition was supported by an affidavit. Now, to make out the charge of perjury, it should have been shown that this affidavit was necessary for the purpose of supporting the petition. That could only be shown by proof of the regular practice of the Court. Then the question arises, has the practice been properly proved? That practice may be contained in certain rules either unwritten or written. If unwritten, they may be proved orally by some person acquainted with them; if written, by production of the original, or of an examined copy. The witness called was unable to prove them by either of these modes. He had no personal knowledge of them. He said there was a certain paper hung up in the office of the Court containing the rules, but he had never compared his copy with that paper.

Rule absolute.

The KING *v.* MARSH.

The truth of a record cannot be impugned by affidavits upon motion, but a writ of error in fact must be resorted to.

Quære, is it necessary that the caption to an indictment returned to a writ of *certiorari* should contain the names of the grand jurors.

THE indictment in this case was found by the grand jury at the *Dover* Borough Sessions, *February* 1836. The defendant afterwards removed it into this Court by *certiorari*, and was convicted upon it at the summer assizes for the county of *Kent*, 1836. In *Michaelmas* term, a rule *nisi* to quash the indictment, on the ground that more than twenty-three persons had been sworn in on the grand jury who found the bill of indictment, was discharged by this Court (*a*). The caption of the indictment, as returned to the writ of *certiorari*, omitted the names and additions of the grand jury. A rule, calling upon the prosecutor and the town clerk to show cause why the caption returned to the writ of *certiorari* should not be amended by inserting therein the names and additions of the grand jury sworn at the sessions at which the indictment was found, *according to the truth of the fact*, was subsequently

(*a*) See 2 Har. & Wol.

obtained upon affidavits, stating that twenty-eight grand jurymen were sworn, and that twenty-five took part in the consideration of the bill. The affidavit by the town clerk, in opposition to the rule, stated that he had nothing by which he could amend, and that the record was no longer in his custody.

Sir *W. W. Follett*, on behalf of the town clerk, and *Platt*, on behalf of the prosecutor, now showed cause.—The Court has no power to make this rule absolute. If the Court had the power, it would be wholly unavailable, since there are no means existing by which the amendment can be made. It is impossible to ascertain what occurred in the grand jury-room, without a violation of the oaths sworn by the grand jury. The transcript of the record is not only valid, but conclusive as to its contents, *Salter* v. *Slade* (*a*.) The amendment proposed is for the purpose not of furthering, but of defeating, justice. All the steps which have been taken between the finding of the bill and the trial, were actually taken by the defendant himself, and this is therefore not an application which the Court will favour.

Sir *J. Campbell*, A. G., *Thesiger* and *Channel*, in support of the rule.—This rule is drawn up in the very same terms with the rule in the case of *The King* v. *Darley* (*b*); and there the rule was made absolute without opposition. There is no wish that the grand jury should violate their oaths. The only object sought is, that the caption should be amended according to the truth of the fact, that the town clerk should perfect his return, which is now incomplete by reason of the omission of the name of the grand jury. On the former application to the Court to quash the indictment, the Court declined to accede to the application before made in this case, but intimated their concurrence with the doctrine laid down by Lord *Mansfield* (*c*) and *Blackstone* (*d*), that no more than twenty-three persons could lawfully be sworn on the grand jury. The defendant therefore ought to have an opportunity of taking the proper advantage of the irregularity, and the only object of this motion is to place the actual facts upon the record, so that the objection may at once, in the most convenient manner, be brought before the Court, and that it may be unnecessary to bring error in fact. The making up of the record is not the act of the defendant, who removed the indictment, it is the act of the officer of the crown. The statement that now appears is, that the indictment was found by twelve and others; but in returns from an inferior court, the names of the grand jury should be set out.—[Lord *Denman*, C. J.—It is said by *Buller*, J. (*e*), that the insertion of the names of the grand jury is unnecessary.]—It appeared that they were not necessary for the purposes of the rule in that case; all that *Buller*, J. says, is, that it is not error to omit them; we say so too; nor is it necessary, in ordinary cases, that these facts should appear on the *nisi prius* record, or the roll; but when justice requires it, the actual facts should appear. If those facts were to be now returned, there could be no objection to amend the caption by them. Here they have perhaps been purposely omitted. The answer of the town clerk is evasive; but, at all events, it sufficiently appears from it, that more than twenty-three were sworn. Since this motion has been made, a list has been received from

(*a*) 1 Adol. & El. 608; and 3 Nev. & Man. 717, *S. C.*
(*b*) 4 East, 174.
(*c*) 2 Bur. 1088.
(*d*) 3 Bl. Com. 302.
(*e*) See note to *Rex* v. *Darley*, 4 East, 176.

the foreman of the grand jury. That list was delivered to him by the town clerk; it contains the names of all the grand jurors, and of those sworn.—[Lord *Denman*, C. J.—That list is no part of the proceedings, it was not delivered by the officer in the execution of his duty, and it would be extremely dangerous for this Court in any way to notice what was a mere minute made out for the private convenience of the parties.]—But the town clerk is in possession of the sheriff's precept and return, from which the amendment sought could easily be made. In *Rex* v. *Atkinson* (*a*), the clerk of the peace attended with his book of minutes in Court, for the purpose of its being inspected.—[*Coleridge*, J.—The clerk of the peace swears that he has nothing by which to amend. Can we call upon him to make a return from his recollection only?]—If that return be not inconsistent with his former return; a return of the names is nowise inconsistent with the former return. If we had here the minute-book of the town clerk, this case would be on all-fours with *Rex* v. *Darley*, and the difference is not substantial, because he has the materials from which such minutes might be made. The notes to *Faulkner's* case (*b*) contain a summary of the law on this subject, and it there clearly appears, that the Court have repeatedly acceded to applications of this nature, where it became necessary for the facts to be brought before the Court. It is true, that those applications have heretofore been made on the part of the prosecution; but if such indulgence is allowed to the prosecutor, a portion of it will be granted to the defendant. In *Hale's* Pleas of the Crown (*c*), it is laid down, that the caption must contain the names of all the jurors that presented the offence; and the reason for it is given, that possibly some of them may not have been *legales homines*, and that, by suppressing the names, the party indicted might be deprived of his power to except to them, and to quash the indictment. In *Rex* v. *The Justices of Middlesex* (*d*), it is laid down by the Court, that the party indicted has a right to have the record of the proceedings correctly made up, and to make any use of it that he can. He therefore has a right to a history of all the facts. He has the same right, whether it be considered that the record itself has been sent up, or only a transcript of it (*e*); and that even supposing that the transcript must be considered as a correct copy.—[*Coleridge*, J.—Would you not then suggest that the original record should be made up correctly, and then apply for a transcript of that?]—That might have been more correct; but the Court will mould this rule so as to meet the justice of the case.

Thesiger claimed a right to read an affidavit made in support of the previous motion in the same case, to quash the indictment.—[*Coleridge*, J.—In order to have a right to read that now, you should have read it when moving for the rule *nisi*.]

Lord DENMAN, C. J.—It appears to me that this rule must be discharged. We will amend a record where there is any thing to amend by; but to call on the clerk of the peace to amend a record, which appears on the face of it perfectly regular and lawful, by what he may be able to recollect himself,

(*a*) See note to *Rex* v. *Darley*, 4 East, 175
(*b*) 1 Wms. Saund. 249.
(*c*) Vol 2, p. 167.
(*d*) 5 B. & Adol. 1113.
(*e*) *Salter* v. *Slade*, 1 Adol. & El. 608. Judgment of Lord *Mansfield*, in the note to *Faulkner's* case, 1 Wms. Saund. 249.

or may learn from other persons, seems to me to be the most unreasonable application that ever was made. A defendant, who has been tried by a jury of his country, and found guilty, is not afterwards to call on all who sat in authority over him, to state all the particulars of the various proceedings, in order to show us that some minor irregularity has been committed. Such applications, if encouraged, would be endless. We have already expressed a clear opinion that twenty-three is the largest number which ought to sit on a grand jury, and I trust, that hereafter that number will not be exceeded. Is it then necessary that all the names of the jurors should be returned? Lord *Hale* says (*a*), it seems to him that they ought, because one of the persons who served may be outlawed, or he may be an incapable person; and yet have had greater influence in finding the bill, than those properly there. That is a strong reason why all the names should be inserted; but Lord *Hale* does not lay it down, nor can it be found in any book, that the insertion of all the names is essential to make the caption good, and the indictment well found; on the contrary, there is the opinion of Mr. Justice *Buller*, expressly stating, that the names of the jurors are not necessary to be set forth on the caption. As to what passed, with regard to what was called "The Mistake Sessions," I know the judges had the very greatest doubt whether it was necessary to take any steps at all on the error which was then discovered. And I must own it always appeared to me that there was a danger, lest those proceedings should lead to these subsequent unravellings of what may have taken place, with perfect order, and according to the course of the law, for the purpose not of futhering, but of defeating justice. It seems to me that where a party has to make out error in fact, he should not use affidavits which place us in the great difficulty of deciding according to probabilities; but should plead it, and prove it strictly.

WILLIAMS, J.—I am entirely of the same opinion. I have waited anxiously to see whether any thing appeared before us to show what was the caption in the court below. I take it to be perfectly clear in point of practice, that there is only one general heading of the proceedings at each sessions, and from that, provided any indictment is removed, a record is made up in each particular case. And it has been decided in *Rex* v. *Fearnley* (*b*), that if, upon the return to the *certiorari*, the caption itself be bad, advantage may be taken of it upon demurrer, as well as of any defect on the face of the indictment itself. Now, if there was no other caption of the sessions, but that in the form which is here returned, then do I say, that there is nothing to amend by, even if it be necessary that the name of every individual grand juror who found this bill should be returned. It seems to me, therefore, that we ought to refuse this rule.

COLERIDGE, J.—I quite agree with Mr. *Channell*, that we ought to dispose of this case on general principle, and with a view to the great ends of public justice. I desire so to deal with it; and therefore, while agreeing with the rest of the Court, I dismiss from my consideration all that has been said by the prosecutor. I consider this as a rule calling on the town clerk to show cause why the return should not be amended, by inserting therein the names

(*a*) 2 Pl. Cr. 167. (*b*) 1 T. R. 316.

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and additions of the grand jury sworn at the sessions. Now, let us see what the state of facts is: there is at the sessions an original general caption to all the indictments there found, of which this is one. The defendant has sued out a *certiorari*, and he has removed the original indictment, and he has removed what purports to be a transcript of the caption. Now, that either is, or is not, a true transcript of the original caption remaining at the sessions. If it be not a true transcript, nothing could have been more easy than for that fact to have been stated by the party who makes this application; it is not stated that it is not a true transcript, and it must therefore be taken for the present, that it is a true transcript. Then the town clerk has *primâ facie* done his duty—he has returned a true transcript. That does not answer the purpose of the defendant, and then he says it is not true according to the fact. Now, then, where is the mistake? It is said in the original caption. Mr. *Channell* then says, that ought not to defeat the purposes of this rule. I think there is a short answer to that. A rule, calling upon the town clerk, would not be sufficient for the purpose, because the town clerk could not now take upon himself to amend the original caption, without some order from the higher authorities in his Court; at all events, other persons should have been called on to show cause against the rule for making up the original caption in a different form. But there is another objection which also applies to the amendment of the transcript of the caption, that he who calls on a public officer to amend a record, is bound to show something by which he may amend. It is a maxim of law, to impute to records almost an absolute verity. Then, in what a contradiction should we be involved, if, while we hold a record imports absolute verity, we yet say it might, at any distance of time, be amended, not by any written document that existed at the time when it was originally made up, but from the loose memory or casual information of any individual. There is nothing by which the record can safely be amended, and this rule must be discharged.

Platt then applied for the costs, which were refused.

PATTESON, J.—Mr. *Dealtry* has mentioned, that in *Rex* v. *Allen* a writ of error was brought, and the error assigned was, that the names of the jurors were not inserted, but the Court held it to be immaterial.

Rule discharged (*a*).

(*a*) See *Rex* v. *Daris*, 1 Car. & Pay. 470.

January 24.

AYLING and Wife v. WHICHER.

In Trover by husband and wife for an inventory, the declaration stated, that, by indenture of mortgage, certain goods mentioned in an inventory annexed to the said indenture, were assigned to the wife before their marriage, with a proviso, that if the mortgagor should repay her 95*l.* on the 24th day, 1838, or on such earlier day as she should require by a written notice, and should, until such repayment, pay 5*l.* per cent. interest, the indenture should be void. That the plaintiffs had obtained possession of the deed and inventory, but not of the goods; that, being so possessed of the inventory, they lost it, that the defendant found and converted it. On demurrer—*Held*, as the goods were not to be taken out of the mortgagor's possession, until after default by him, and as none might be made during the whole continuance, that in the action for the inventory which related to them the wife was not improperly joined.

TROVER. Declaration stated, for that whereas heretofore and before the time of the committing of the grievance by the defendant, as hereinafter

mentioned, and before the marriage of the said plaintiffs, to wit, on the 29th day of *October*, in the year of our Lord 1834, by a certain indenture then made between *George Lemmon* of the one part, and the said plaintiff, *Mary Ann Ayling* (then *Mary Ann Lemmon*) of the other part; it was witnessed that the said *George Lemmon* did bargain, sell, and assign unto the said plaintiff, *Mary Ann Ayling* (then being *Mary Ann Lemmon*), all and every the household goods, furniture, fixtures, plate, linen, and china, stock-in-trade, utensils, implements, and things which were then in, about, and belonging to the public house called or known by the sign of the *Ship*, outhouses and estate of the said *George Lemmon*, situate and being in *Tower Street*, in the parish of *Subdeanery*, in the city of *Chichester*, in the county of *Sussex*, then in his occupation, and which were particularly mentioned, enumerated, and described in a certain inventory thereof to the said indenture annexed; and all the right, title, interest, property, claim, and demand of the said *George Lemmon*, in and to the said goods, chattels, and premises, and every part and parcel thereof, to have, take, receive, and enjoy the said goods, chattels, and premises thereby assigned, or expressed or intended so to be, unto the said *Mary Ann Ayling* (then *Mary Ann Lemmon*), her executors, administrators, and assigns, as her and their own property and effects; provided, nevertheless, and it was thereby declared and agreed by and between the said parties to the said indenture, that in case the said *George Lemmon*, his executors or administrators, should and did well and truly pay or cause to be paid unto the said *Mary Ann Ayling* (then *Mary Ann Lemmon*), her executors, administrators, or assigns, the sum of 95*l.*, on the 29th day of *October*, which would be in the year of our Lord 1837, or at any such earlier day or time as the said *Mary Ann Ayling* (then *Mary Ann Lemmon*), her executors, administrators, or assigns, should appoint for the payment thereof, in and by a notice in writing, to be given to the said *George Lemmon*, his executors or administrators, or left at his or their last or usual place of abode, at least three calendar months before the day or time so to be appointed for payment as aforesaid; and did and should in the meantime, until the re-payment of the said principal sum of 95*l.*, at either of the periods aforesaid, well and truly pay or cause to be paid unto the said *Mary Ann Ayling* (then *Mary Ann Lemmon*), her executors, administrators, or assigns, interest thereon, at the rate of 5*l.* per cent. per annum, by equal quarterly payments, on the 29th day of *January*, the 29th day of *May*, the 29th day of *August*, and the 29th day of *October* in every year; and also a proportional part of such interest for the fractional period of a quarter, if any, which should elapse between the last day of payment and the expiration of the notice so to be given by the said *Mary Ann Ayling* (then *Mary Ann Lemmon*), her executors, administrators, or assigns, for the payment of the said principal sum of 95*l.* as aforesaid, such proportional part to be paid immediately on the expiration of such notice; and such several payments aforesaid to be made without any deduction or abatement whatsoever; then and in such case the said indenture, and every article, clause, and thing therein contained, should cease and determine, and be absolutely void, any thing therein contained to the contrary thereof notwithstanding: And whereas also the said plaintiffs have not, nor hath either of them as yet received or obtained possession of the said household goods, furniture, fixtures, plate, linen, and china, stock-in-trade, utensils, implements, and things, or any or either of them, or any part

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thereof: And whereas also the said plaintiffs heretofore, to wit, on the 24th day of *July*, in the year of our Lord 1835, were lawfully possessed as of their own property of the said indenture, and of the said inventory; the said inventory then being of great value, to wit, of the value of 100*l.* of lawful money of Great Britain; and being so possessed thereof as aforesaid, the said plaintiffs afterwards, to wit, on the day and year last aforesaid, casually lost the said inventory out of their possession, and the same afterwards, to wit, on the day and year last aforesaid, came to the posession of the said defendant by finding; yet the said defendant, well knowing, &c., converted and disposed of the said inventory to his own use.

Demurrer, for the following causes: that the said declaration states that the said plaintiffs were possessed of the said inventory before the said inventory was in any manner received by the said defendant, and therefore the inventory was the property of the said plaintiff, *Henry Ayling:* and that the said *Mary Ann*, his wife, ought not to join in an action for recovery of the said inventory, after it had so become the property of the said plaintiff, *Henry Ayling;* and it is not averred in the said declaration, that the said defendant in any manner received the said inventory before the intermarriage of the said plaintiffs.

Gale, in support of the demurrer.—The wife cannot join with the husband in trover to recover his property. The general rule is laid down in the notes to *Wilbraham* v. *Snow* (*a*), husband and wife cannot have an action of trover and declare that they were both possessed of certain goods, and that the defendant converted them to their damage, for the possession of the wife, is the possession of the husband, and so is the property. This case, in which the inventory alone is sought to be recovered, falls within the rule. Even if it were conceded that the inventory stood in the same position with the goods to which it relates, still the wife could not join, for the goods vested by the marriage *ipso facto* in the husband; the want of possession makes no difference (*b*); it does not make the goods *choses in action*. There are two cases in equity which show clearly that a want of possession does not prevent the vesting of the property. In *Hart* v. *Nash* (*c*), a cheque given to a wife after her marriage was held to survive to her, but on the ground that "it was merely a *chose in action*, and not like money or a chattel." So in *Wildman* v. *Wildman* (*d*), of stock standing in the name of the wife, "that it is nothing but a right to receive a perpetual annuity, a mere right having semblance to a chattel moveable or coined money capable of manual apprehension. But here the deed vested the property in the goods in the wife before the marriage, and the marriage transferred them absolutely to her husband. In actions by baron and feme, as in all other actions where there is more than one plaintiff, an injury must be shown to have been done to all the plaintiffs; and there are but three ways in which the wife can sustain any injury: by acts done injurious to her property before marriage; acts injurious to her personally; acts injurious to property which would survive to her.

Peacock, contrà.—The husband might sue alone or jointly with his wife.

(*a*) 2 Wms. Saund. 47, note i.
(*b*) Bacon Abridg. Detinue, A.
(*c*) 2 Madd. 139.
(*d*) 9 Ves. 174.

If the wife should survive the husband, and he should not have reduced the goods into possession, they would vest in her, and not in the executors of her husband. The goods in this case have not been reduced into possession, and are a mere *chose in action*, which could not be assigned by him, and would survive to her; *Purdew* v. *Jackson* (*a*). But it is said that the inventory is admitted to have been in possession of the husband, and that it cannot be incident to things of a personal nature. But it cannot be contended, in case of the wife surviving the husband, that the wife would have to sue for the goods, and the executors of her husband for the inventory. The declaration shows that there had been a mortgage of the goods to the wife, but that they had never been reduced into possession. The wife might join in trover for a deed securing a rent charge granted to her *dum sola*, and this rule is not confined to deeds relating to real property. *Com. Dig. Bar. and Feme* (V); *Bac. Abr. tit. Detinue*, B.

Gale, in reply.—The cases cited on the other side, are cases of injury to property which would survive to the wife.—[Lord *Denman*, C. J.—The day for the repayment of the money secured by the bill of sale has not arrived.] —That does not prevent the property vesting in possession by the bill of sale; there is no provision in the deed that the mortgagor shall remain in possession. In *Martindale* v. *Booth* (*b*), where a mortgagor under a bill of sale remained in possession of the goods, an action of trespass was nevertheless brought by the mortgagee against the sheriff who had taken them in execution on a judgment against the mortgagor. No such action could have been maintained unless the property vested in possession by the deed. Property in things personal draws to it the possession.

Lord DENMAN, C. J.—It appears to me that this is one of those cases in which the husband may sue alone, or the husband and wife jointly; because I think it is quite clear that these goods cannot be said to have been reduced into possession by the husband, at a time when it is possible the interest may always be paid, and the principal money repaid, in which case the goods would never come into the possession of either party. The husband undoubtedly might sue for the inventory separately, for he is prevented by the non-possession of it from reducing the goods into possession; but at the same time the wife's interest continues in such a manner that in case of the husband's death it would be an entire interest in her, and on her death would go to her executors. This is a case in which, if the husband may sue alone, he does not do wrong in joining his wife. Her interest then continuing in the goods must be taken to extend equally to the deed or other instrument by which the right to the possession of the goods may be inforced. I think the wife has been properly joined as plaintiff.

WILLIAMS, J. concurred.

COLERIDGE, J.—The true test in these cases is, not whether the husband might have sued alone, but whether there is such a continuing interest in the wife, that in any state of things after the husband's death she would have the

(*a*) 1 Rus. 1. (*b*) 3 B. & Ad. 498.

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right of action? In this case there has been a mortgage of chattels by deed. It is stated on the face of the deed, that if the interest at 5 per cent. be paid, and the principal repaid on certain notices being given, this deed is to be void. On the face of it therefore it appears, that during the payment of the interest the goods are not to pass into the possession of the mortgagee. That is the state of things under the deed. The declaration says, that the husband and wife never in point of fact received or obtained possession of the goods. I do not say that in all cases it is absolutely necessary, with regard to a personal chattel, that the husband should reduce it into actual possession to secure a sole property in it. But I say, that in this particular case the deed seems to contemplate that the property is not to pass, except under certain circumstances; but those circumstances may never arise at all, and the present state of things may continue through the whole of the coverture. If that should be so, and the wife should survive the husband, she would have a right to the goods, and not the husband's executor. I think, therefore, she was well joined.

HAYWARD *v.* HASWELL.

Jan. 24.

An instrument, containing the terms of a tenancy of certain premises, stipulated that the lease thereby agreed to be granted should be granted immediately after the alleged lessor should obtain his lease of the same premises under an agreement previously entered into for that purpose:—
Held, it appeared therefrom, that the alleged lessor had no power to demise, and that the instrument therefore was only an agreement for a lease.

SPECIAL case for the opinion of the Court. Replevin. Avowry for rent in arrear. Plea, *non tenuit*. At the trial before Lord *Denman*, C. J. at the sittings in *London* after *Michaelmas* Term, 1835, the defendant put in, as evidence of the tenancy, an instrument in the following words:—

"Articles of agreement made and concluded the 21st day of *May*, 1833, between *C. P. Haswell*, &c. of the one part, and *Catherine Hayward*, &c. of the other part, as follows; that is to say, *Charles Pritchard Haswell*, in consideration of the agreements hereinafter contained on the part of the said *Catherine Hayward*, her executors or administrators, agrees to grant, at the time hereinafter mentioned, unto the said *C. H.* a *lease* of all that piece, &c., containing, &c., with the messuage or tenement, workshops and buildings, except such of them as are to be pulled down, as hereinafter is provided for: And also of the dwelling-house, workshops, &c. hereafter agreed to be erected and built on the site thereof, with their appurtenances, &c. as the same now are and have been for many years past, in the possession of the said *C. H.* for the term of 59 years and one quarter of another year, wanting ten days, from the 25th of *March* last, at the rent of 12*l.* 10*s.* for the first half year of the said term, payable in equal portions, on the 24th day of *June* and the 29th day of *September* next, and at the yearly rent of 60*l.* for the remainder of the said term, payable quarterly on the 25th day of *December*, &c. &c.: And for the consideration aforesaid the said *C. P. H.* further agrees to and with the said *C. H.*, her executors, administrators, and assigns, that he the said *C. P. H.* shall and will, within the space of four calendar months from the date hereof, at his own proper costs and charges, under the inspection and to the approbation and satisfaction of the surveyors for the time being of the Merchant Tailors' Company, erect, build, and finish fit for habitation, in a good and workmanlike manner, on the before-mentioned piece of ground, a dwelling-house and workshops, according to a certain specification and plans annexed, &c. &c.: And the said *C. H.* in consideration of the costs and charges, &c. agrees, that the said *C. H.* shall and will accept and take the said lease, and execute a counterpart thereof when tendered to her for that purpose: And also that she the said *C. H.* shall and will, within the like period of four months, at her own costs and charges erect, build, and finish on the said piece of ground all such other erections and buildings, in addition to those hereinbefore agreed to be erected and

built by the said *C. P. H.* as are required to be erected and built under and by virtue of certain articles of agreement, bearing date the 5th day of *October* last, and made between the *Merchant Tailors' Company* of the first part, the Venerable *Joseph Holden Pott*, Archdeacon of *London*, &c. &c. of the second part, and the said *C. P. H.* of the third part; and in conformity therewith, and that the erections to be so respectively erected and built by the said *C. P. H.* and *C. H.* when finished, shall be of the aggregate value of 800*l.*: And it is hereby agreed and declared, by and between the parties hereto, to be the true intent and meaning of them and of these presents, that *the lease hereby intended to be granted shall be granted immediately after the said C. P. H. shall obtain his lease of the said premises under the before-mentioned agreement of the 5th of October last, and which he shall obtain with all convenient speed at his own costs and charges*, and shall contain on the part of the lessee like covenants, provisoes, and agreements to those to be contained in the original lease of the said premises so to be granted to the said *C. P. H.* as aforesaid, and such other covenants as are usual and common in like leases: And that the said *C. H.* &c. shall and will well and truly pay the rent hereby agreed to be paid, on the days and in the manner aforesaid, as if the lease hereby intended to be granted had been executed and performed, and that all and every the stipulations to which the said *C. P. H.* is subject to by the agreement under which he holds the said premises, except such as he is bound to perform by virtue or in pursuance of these presents, and from time to time indemnify and keep indemnified him the said *C. P. H.* &c. of, from, and against all loss, damage, or expense which he or they may incur or sustain by reason of the non-performance thereof: And it is also agreed by and between the parties hereto, that the said *C. H.*, her executors, administrators, or assigns, shall and will pay or reimburse the said *C. P. H.*, his executors, administrators, or assigns, the amount of the costs and charges for preparing these presents, and also of the following instruments, *videlicet*, the agreement and counterpart between the said Company and the said *C. P. H.*, the lease and counterpart to be executed by him unto the said *C. H.*, her executors, administrators, or assigns, by virtue of these presents; which latter is to be prepared by the solicitor to the said *C. P. H.*: Provided always, that if it should happen that the said *C. H.*, her executors, administrators, or assigns, shall neglect to pay the before-mentioned rent on the days and in the manner hereinbefore provided, or shall neglect to perform, fulfil, and keep all and every the stipulations and agreements hereinbefore contained, and on her part to be performed, fulfilled, and kept, according to the true intent and meaning of these presents, then and in either of those cases this agreement, so far as relates to the engagements of the said *C. P. H.*, his executors, administrators, or assigns, shall be void and of no effect; and he or they shall immediately thereupon be at full liberty to retain or enter upon possession of the premises hereby agreed to be let and relet, or otherwise dispose of the same to the exclusion of the said *C. H.*, her executors, administrators, or assigns, any thing hereinbefore contained to the contrary in anywise notwithstanding: And the said *C. P. H.* doth hereby agree to and with the said *C. H.*, her executors, administrators, or assigns, that in case the said *C. P. H.*, his executors, administrators, or assigns, shall neglect to perform, fulfil, and keep all and every the stipulations and agreements hereinbefore contained, and on his part to be performed and kept, then that he the said *C. P. H.*, his executors, administrators, or assigns, shall and will upon demand pay unto the said *C. H.*, her executors, administrators, or assigns, the sum of 500*l.* as and for liquidated damages. In witness, &c."

Lord *Denman*, C. J. being of opinion that this instrument did not constitute a demise, directed a verdict for the plaintiff for the value of the goods taken, but reserved leave to move to enter the verdict for the defendant. The question for the Court was, whether the above instrument was a lease, or an agreement for a lease.

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R. Gurney for the plaintiff.—This instrument cannot be construed as a demise. Although the contemplation of a future lease is not conclusive, according to *Warman* v. *Faithful* (*a*), yet the uncertainty of its ever being in the defendant's power to grant a lease at all, is quite conclusive of the question. The words "that the lease hereby agreed to be granted shall be granted immediately after the said *C. P. H.* shall obtain his lease of the said premises under the before-mentioned agreement of the 5th of *October* last, and which he shall obtain with all convenient speed at his own costs charges," &c. show that the defendant had at this time no power to demise. *Doe* d. *Coore* v. *Clare* (*b*), therefore, is in point to show that this instrument cannot be sustained as a lease. The fact of the defendant not having power to demise, distinguishes this from all the cases which may be cited on the other side.

Gordon, contrà.—In *Doe* d. *Coore* v. *Clare* the instrument recited, that *A.*, in case it should turn out that he was entitled to certain premises on the death of *B.*, another person, would demise them, and contained a covenant to procure from the lord a licence to let, and it was uncertain whether the licence would be granted. Here the *Merchant Tailors' Company* was already under articles of agreement with the defendant to grant him a lease, which there could be no doubt would be granted him accordingly. He had therefore virtually the power to grant an under-lease to the plaintiff.

Gurney, in reply, was stopped.

[The arguments in this case comprehended many other points, which have been omitted, as they were not adverted to by the Court.]

DENMAN, C. J.—It is impossible to say that this instrument is a lease, when it appears clearly from its terms that the defendant had not the power to grant a lease.

WILLIAMS, J. and COLERIDGE, J. concurred.

Judgment for the plaintiff.

(*a*) 5 B. & Ald. 1042. (*b*) 2 T. R. 739.

Jan. 26.

The assignment of his estate by an insolvent debtor, who has been discharged under 53 *Geo.* 3, c. 102, cannot be proved by a certified copy of the assignment, as under 7 *Geo.* 4, c. 57, s. 76.

DOE *d.* THRELFALL and another *v.* SELLERS.

EJECTMENT for lands in *Staffordshire* by the assignee of an insolvent debtor. At the trial before Lord *Denman*, C. J. at the *Staffordshire* summer assizes, 1835, a certified copy of the assignment from the insolvent to the provisional assignee, under the seal of the Insolvent Debtors' Court, was tendered as evidence of the assignment, but objected to, on the ground that the insolvent having been discharged in 1816, under 53 *Geo.* 3, c. 102, the proper mode of proof was by production of the original, or at least by an examined copy. His lordship received the evidence, reserving leave to the defendant to move to enter a nonsuit, if the Court should be of opinion that the evidence was inadmissible.

Maule having accordingly obtained a rule *nisi*,

R. V. Richards and *Busby* now shewed cause.—The assignment in this case was properly proved. The *53 Geo.* 3, c. 102, expired on the 1st of *November*, 1819; then came 1 *Geo.* 4, c. 119, which was in part repealed by 7 *Geo.* 4, c. 57. Under neither of the two latter acts could any doubt be raised against the evidence admitted in this case; *Doe* d. *Phillips* v. *Evans* (*a*). But it is said that section 76 of 7 *Geo.* 4, c. 57, providing that a copy of the proceedings in the Insolvent Debtors' Court, sealed with the seal of the Court, is to be sufficient evidence of the same, does not apply to proceedings under *53 Geo.* 3, c. 102. All three acts, however, form parts of one connected system. The 1 *Geo.* 4, c. 119, s. 36, carries on to the Court thereby established all the powers given to the Court previously established by *53 Geo.* 3, c. 102, and then enacts, in section 37, that all records, &c. received under the prior act shall be delivered over to the Chief Clerk of the new Court, and shall be deemed and taken to be the records of the new Court, of which a certified copy is, by section 45, to be the legal evidence in all Courts whatever. Again, the 7 *Geo.* 4, c. 57, reciting the last act, and continuing the Court established by it, and the powers vested in it, provides, in clause 89, that its records, &c. shall be preserved and deemed and taken to be the records of the Court so continued. The records, then, of the old Court being records of the new Court, as continued by 7 *Geo.* 4, c. 57, they are all to be evidenced alike in the mode prescribed by this last act in its 76th section. [*Coleridge*, J. Why may not the 89th section have a general application to the records of all proceedings, and the 76th be restricted to the records of such proceedings as are taken under that act alone?] It would be very inconvenient to have a different mode of proof in the two cases, and the language of the two clauses does not point out any such distinction.

Maule, contrà.—The authority of *Doe* d. *Phillips* v. *Evans* might perhaps be questioned, inasmuch as section 76 using the words, "such prisoner," must intend the description of prisoner before mentioned, which, on going back through the preceding sections to section 10, is manifestly such prisoner as may be discharged under the provisions of that act alone. But it is not necessary for the defendant to impugn the accuracy of that decision, as it merely established that the records of proceedings under 1 *Geo.* 4, might be proved after the new fashion prescribed by 7 *Geo.* 4. But it was the 1 *Geo.* 4, c. 119, s. 7, that *first* made the assignment a record of the Court. The document then in the case cited was made a record by that act; but under the previous act the assignment formed no portion of the recorded proceedings of the Court. It was therefore simply a muniment of the assignees' title, of which even an examined copy would not have been evidence. The original itself should have been produced. [He was then stopped.]

Lord Denman, C. J.—We are all satisfied that the distinction pointed out is well founded, and it presents an objection to the evidence in this case which cannot be answered.

Rule absolute.

(*a*) Crom. & Mees. 450.

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The KING *v.* The Justices of BUCKINGHAMSHIRE.

Jan. 30.

By a local act trustees were empowered to borrow money for the purpose of pulling down and rebuilding a parish church, and to charge the sum borrowed upon rates to be made under the act "on houses, warehouses, shops, buildings, lands, tenements, and hereditaments, rated or rateable to the poor of the said parish, on all and every the tenants and occupiers of the said parish." *Held*, that tithes were rateable.

RULE *nisi* for a *mandamus*, commanding the defendants, justices of the county of *Bucks*, to grant a warrant of distress upon the goods of *Henry Webb*, in satisfaction of a rate made in pursuance of 1 *Will.* 4, for taking down the parish church of *Great Marlow*, in the said county, and for rebuilding the same.

The act empowered trustees to borrow, for the above purposes, a sum of 10,000*l.*, to be charged upon certain rates to be made in pursuance thereof, on the full annual rent or value of the houses, warehouses, shops, buildings, lands, *tenements and hereditaments rated or rateable to the poor of the said parish of Great Marlow, on all and every the tenants and occupiers of the said parish.*

Persons refusing to pay their proportion of the rate were to be summoned before a magistrate, who was empowered and required to make an order for its payment, and in case of their non-compliance, to issue a distress warrant for the amount. The act allowed an appeal against the rate to the trustees, and from them to the quarter sessions. A rate for the sum of 31*l.* 10*s.* 0*d.* had been duly made on Mr. *Webb*, who was the lessee of the great and small tithes and glebe of the parish. Having refused to pay the above sum, he was summoned before two magistrates, and on his contending that the tithes and glebe, which had been assessed, were not within the description of property made rateable by the act, they declined issuing their warrant of distress.

Sir *W. W. Follett* and *J. G. Phillimore* shewed cause against the rule.—All property rateable to the relief of the poor is by this act subjected to the new church rate; but the legislature could never have intended to include tithes, which, although rateable to the relief of the poor, have always been exempted from church rates, on the ground that they are chargeable for the repairs of the chancel (*a*). The body of the church is to be repaired by the parishioners. If tithes also are to contribute, they will have a double burthen cast upon them. The word "hereditaments" standing by itself, has no doubt a wide signification; but the other words with which it is associated, particularly the words "tenants and occupiers," restrain its signification in this instance. In *Rex* v. *The Manchester and Salford Waterworks Company* (*b*), the question was as to the rateability, under a lighting and paving act, of certain pipes and apparatus, and it was held that the word "tenement" in the act was so qualified by the context as not to include such property, which, but for the context, it clearly would have included. In *Rex* v. *The Shrewsbury Trustees* (*c*), the word "hereditaments" would have been controlled in like manner, if the special exception of certain property in that case had not indicated that no other exception was intended. The import of this latter word in relation to tithes is noticed in *Phillips* v. *Tomes* (*d*). The Court will act upon the principle recognized very recently in *Rex* v. *Dyer and Hall* (*e*), and not expose the defendants to an action, by compelling them to issue a warrant, of which the legality may be doubtful.

(*a*) Gibson's Codex, 199, c. 5, tit. iii.
(*b*) 1 B. & C. 630.
(*c*) 3 B. & Ad. 216.
(*d*) 3 Bos. & Pul. 362.
(*e*) 2 Ad. & Ell. 606; S. C. in note to *Rex* v. *JJ. of Somersetshire*, 1 Harr. & Woll. 83.

Kelly in support of the rule.—The Court will have no scruple in this case. Mr. *Webb* has altogether neglected the remedy given him by appeal. To prevent all ambiguity, the act itself has furnished the criterion of rateability under its provisions—namely, rateability to the relief of the poor. (He was then stopped.)

Lord DENMAN, C. J.—It would be repealing this statute to say that tithes which are an hereditament rateable to the relief of the poor are not subject to this church rate. We should follow the rule acted upon in *Rex* v. *Dyer and Hall*, if we had any doubt at all upon this question.

WILLIAMS, J. concurred (*a*).

(*a*) *Littledale*, J. absent from illness; *Coleridge*, J. in the Bail Court.

The KING *v.* The Overseers and Churchwardens of EDLASTON.

Jan. 31.

1. *Mandamus* to churchwardens and overseers to make a poor rate, recited, that no rate had been made for the *necessary* relief of the poor, pursuing the form given by the Crown Office. *Held*, that the writ was good, and that it sufficiently appeared that a rate had become necessary.

2. *Mandamus* against churchwardens and overseers may be sued out by one of their own body. 1 *W.* 4, c. 21, does not affect the law concerning the parties by whom *mandamus* may be prosecuted.

MANDAMUS. The (*a*) recital of the writ was, "whereas we have been informed that there is no legal rate or assessment made by you, the said overseers and churchwardens of the said parish, upon the inhabitants and occupiers of lands, houses, and other things rateable within the said parish, for and towards the *necessary relief, support, and maintenance, of the poor of the said parish*, according to the form of the statute in such case made and provided: but that you, the said overseers and churchwardens, not regarding your duties in this respect, have absolutely neglected and refused, and still do neglect and refuse, to make any such rate, &c. &c." *Whitehurst*, in *Michaelmas* term last, obtained a rule to shew cause why the writ should not be superseded, on the ground that it had been obtained by one of the overseers, to whom it was directed; or why it should not be quashed as insufficient upon the face of it, in not shewing that a rule had become necessary.

Greaves now shewed cause.—Any one overseer or churchwarden may sue out this writ, which must unavoidably be addressed to all; *Anonymous* (*b*). (He was then stopped.)

Whitehurst, contrà.—The case cited was decided before the late act, 1 *W.* 4, c. 21, which assimilates the proceedings upon *mandamus* in ordinary cases to the proceedings under 9 *Ann.* c. 20, upon *mandamus* in respect of rights to offices and franchises, and regulates the costs of the proceedings. There must be two parties in these cases—a party to prosecute, and a party to make a return to the writ. Suppose *Gadsby* were purposely to make a bad return, there would be this absurdity, that he would be the person to plead to it; that on the issue joined he would recover judgment against himself, costs against himself, to be levied by a writ of *ca. sa.* against himself. There is another objection to the writ. It is not shewn on the face of it, that any rate was necessary. Admitting every fact stated in the writ, there has been no default on the part of the parish officers. If they had been guilty of the

(*a*) See 1 Nev. & Per. 20. (*b*) 2 Chitty, 254.

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default alleged, an indictment would lie against them; but an indictment stating only the facts contained in this writ, would be bad. All material facts should be stated upon the writ, to give the party to whom it is addressed an opportunity of traversing them; *Rex* v. *Bishop of Oxford* (*a*), *Rex* v. *The Justices of the West Riding* (*b*), *Rex* v. *The Margate Pier Company* (*c*).

Greaves, in reply.—Inquiry was made at the Crown Office as to the proper form of the writ. This writ is in the same form with that issued in *Rex* v. *St. Nicholas, Leicester* (*d*).

Lord DENMAN, C. J.—The form being such as used in the Crown Office is sufficient; and the word "necessary" is enough to give us jurisdiction. The late act has not made any alteration in the law respecting the parties by whom writs of *mandamus* are to be issued. As for the inconveniences which have been suggested in cases like the present, we will deal with them when they occur.

WILLIAMS, J. and COLERIDGE, J. concurred.

Rule discharged.

(*a*) 7 East, 345.
(*b*) 7 T. R. 467.
(*c*) 3 B. & Ald. 220.
(*d*) Not reported.

The KING *v.* COPE.

Jan. 31.

The mayor and aldermen of *London* are not authorised by 4 *Geo.* 4, c. 64, (the Gaol Act) to make such a classification of prisoners as to exclude from *Newgate* persons committed thereto by the *Middlesex* magistrates for misdemeanors.

INDICTMENT against the defendant, as keeper of the gaol of *Newgate*, for refusing to receive certain prisoners committed to the said gaol by magistrates for the county of *Middlesex*. At the trial before Lord *Denman*, C. J., at the sittings after *Trinity* term, it was admitted that *Newgate* is the gaol for the County of *Middlesex*, as well as for the City of *London*; and the jury found the defendant guilty on all those counts of the indictment which charged the defendant with a refusal to receive persons committed in default of sureties to keep the peace and for misdemeanors; but leave was given to move to set aside this verdict, and enter a verdict of not guilty, if this Court should be of opinion that the mayor and aldermen of the city of *London* had, under the 6 *Geo.* 4, c. 64, a right to exclude from *Newgate* all prisoners, except such as were committed for or convicted of felonies. The defendant had acted under an order made by the Court of Mayor and Aldermen, on the 6th of *July*, 1826, the material part of which directed, "that the class of prisoners to which the gaol of *Newgate* and every part thereof shall be applicable, shall be such prisoners only as are or may be lawfully committed to or detained in the said gaol for felonies, either before or after conviction of the same, and for no other crimes and offences whatsoever."

Sir *J. Campbell*, A.G., on a former day, obtained a rule *nisi* for entering a verdict of not guilty.

Erle and *Addison* afterwards shewed cause (*a*).

(*a*) *Jan.* 20, before Lord *Denman*, C. J., *Williams* and *Coleridge*, Js.

Sir *J. Campbell*, A. G., the *Recorder*, the *Common Sergeant of the City of London*, Sir *W. W. Follett*, *R. V. Richards*, and *Bullock*, supported the rule.

Cur. adv. vult.

The judgment of the Court, comprising all the material arguments in the case, was this day delivered by

Lord DENMAN, C. J.—This was an indictment against the defendant, as keeper of the gaol of *Newgate*, for refusing to receive a prisoner, committed by justices of the peace for the county of *Middlesex*, charged with a misdemeanor. The gaol of *Newgate* is the county gaol of *Middlesex;* and the justices of the peace of that county, before and until the year 1826, had been in the habit of committing persons charged with felonies and misdemeanors to that gaol. The same, however, is locally situated within the limits of the City of *London*, and has always been under the control and direction of the Court of Mayor and Aldermen; the justices of the peace for the County of *Middlesex* never having visited, nor, except as is above mentioned, in any manner interfered therewith. In the year 1826, the Court of Mayor and Aldermen made an order, excluding from the said gaol prisoners committed upon a charge of misdemeanor, in obedience to which the defendant acted, and the validity of which raises the present question, which depends upon the construction of 4 *Geo.* 4, c. 64. That act had for its object, as by the recital and provisions appears, the regulation of gaols and houses of correction, and particularly the classification of prisoners therein; those provisions expressly extending (by section 2) to the gaols and houses of correction in the City of *London*. By the 4th section, justices of the peace for the counties and places to which the act refers, "shall, by orders to be made for that purpose, declare to what class or classes of prisoners every such gaol or house of correction, or any part or parts thereof, shall be applicable." This material section, we think, must be understood as applying to cases where the jurisdiction and power of committal were fully known and understood, and not as in any way interfering therewith. It is also further provided, in this same section, that the order above referred to shall in such case "be signed by the chairman of the sessions, and shall be notified by the clerks of the peace to the several justices of the peace in every such county, riding, division, city, &c.;" a provision obviously applicable to one and the same jurisdiction, and which in the present instance could not have been complied with. The 12th section enacts, that it shall be lawful for the Court of Mayor and Aldermen of the City of *London*, so far as the prisons within it are concerned, and for five justices of the peace, at their quarter sessions respectively, so far as regards prisoners within their respective jurisdictions, whether the same be county, riding, division, or other place, to make such further rules as to them may seem expedient, subject to approval, as therein is provided. In this section also, which is in *pari materiâ* with the fourth, and only as it were a continuance of its powers to future time, the same observation applies with respect to jurisdiction. That seems to be assumed as fixed and settled. The Court of the Mayor and Aldermen in the City of *London*, and justices of the peace at their several Courts of Quarter Sessions, are coupled together in the description of their functions

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and powers. And with respect to the latter (justices in their respective Courts of Quarter Sessions) their power is expressed to be "within their respective jurisdiction," and certainly they could make no rules which would have the effect of enlarging their own jurisdiction, or abridging that of others. It is also observable, that the effect of this order is to transfer the expense of keeping prisoners, committed for trial upon a charge of misdemeanor, from the City of *London*, which heretofore defrayed it, to the County of *Middlesex*. Then follows the 13th section, upon which a good deal of reliance was placed. That provides expressly that all the powers given by the act to justices of the peace at their several Courts of Quarter Sessions, shall be exercised within the City by the Court of Mayor and Aldermen, and not by them as magistrates at the Court of Quarter Sessions for the said city. We think, however, that this section can only be understood as formally recognising the general authority of the Court of Mayor and Aldermen, leaving their power in the particular now under our consideration untouched. It may be clear that the authority to make this order, if it existed any where, was vested in the Court of the Mayor and Aldermen. That, however, obviously leaves the question of their authority as it stood before. Upon the whole, it is certain that the jurisdiction of the justices of the peace of the county of *Middlesex* is not directly taken away; and we think that when another and generally consistent purpose is apparent in the act of parliament, it would be too much to attribute to it, upon doubtful implication, such a large and extensive collateral effect. We will only add in conclusion, that although the mode of classing to be inforced by the order in question (and which is rather the classing of prisons than prisoners) may not be practicable if persons charged with misdemeanors be admitted into the gaol of *Newgate*, it does not follow that there might not be a classification of prisoners therein, though such persons should be admitted. It follows that the rule for an acquittal must be discharged.

Rule discharged.

The KING *v.* The NOTTINGHAM OLD WATERWORKS COMPANY.

Jan. 28.

1. A *mandamus* had issued to a company, under a local act, directing them to summon a jury before the Court of Quarter Sessions for the assessment of damages to a party grieved. The verdict and the judgment thereon were, according to the act, to be registered and deemed records of the sessions to all intents and purposes, but no specific mode was given for recovering such damages. The damages having been assessed, and the company refusing to pay them, the Court issued a second *mandamus* to compel payment, on the ground that it was not clear whether an action of debt would lie on such a judgment of Quarter Sessions, and that *mandamus* was the only clear and effectual remedy.

Quære, Whether debt will lie upon a judgment of Quarter Sessions, which is directed by a local act to be registered by the clerk of the peace, and to be deemed a record to all intents and purposes.

A *MANDAMUS* in this case had, in *Michaelmas* term 1835 (*a*), been directed to this company under 7 & 8 *Geo.* 4, (an act for the more effectual supply of water to the town of *Nottingham*) commanding them to have a jury impanelled at the next quarter sessions for the county, according to the requisitions of the act, for the purpose of assessing to a Mrs. *Turner* the

(*a*) See *Rex* v. *Nottingham Waterworks Company*, 5 Nev. & Man. 498.

damages done by the company's works to certain lands, of which she was tenant for life. The jury having been impanelled thereupon, estimated the damages at 500*l.* An application was made to the defendants to pay this sum, and likewise a further sum of 241*l.* 7*s.* 3*d.* for costs; and on their refusal to do so, applications were then made to the Court of Quarter Sessions, and afterwards to a justice of the peace, for a distress warrant, but without success. Under these circumstances Sir *W. W. Follett* last term obtained a rule *nisi* for another *mandamus* to the company to pay to Mrs. *Turner* the two sums above mentioned, for damages and costs.

M. D. Hill, N. R. Clarke and *Whitehurst*, now shewed cause. Admitting that all the proceedings in this case, up to the time of this rule, are regular, yet this Court will not interfere by *mandamus* if there be any other remedy. *Rex* v. *The Bank of England* (*a*). Now this claim is a debt for which an action would lie. The sum claimed is due by sentence of law, and it is said in *Blackstone*'s *Commentaries* (*b*), "whatever the laws order any one to pay, that instantly becomes a debt, which he hath beforehand contracted to discharge. And this implied agreement it is that gives the plaintiff a right to institute a second action, founded merely on the general contract, in order to recover such damages or sum of money as are assessed by the jury, and adjudged by the Court to be due from the defendant to the plaintiff in any former action." So *Com. Dig.* Action upon Statute (A), and *Anonymous* (*c*). By section 20, any person damnified after the passing of the act shall recover damages "*to be assessed by a jury, and the sum or sums of money to be paid for the same shall be recovered, levied, and applied in such and the same manner as is herein directed with respect to such damages as are hereinbefore provided for, and the money to be paid as a recompence for the same.*" Now although there is no specific mode pointed out for recovering the damages "thereinbefore provided for," by which are meant the damages sustained by the original construction of the company's works, and also the purchase money to be paid for lands taken by the company, yet an action of debt for them is clearly maintainable; and if so, for the damages in question also. With respect to the first description of damages, it is provided "that for *settling all differences as to the compensation to be paid by the company* for land which they may take, an inquisition is to be taken by a jury before the justices at the Quarter Sessions, who are to assess the compensation for the land, and damages which may be occasioned by the company's taking of the land; and the said justices shall accordingly give judgment for such purchase money, recompence, or compensation, as shall be assessed by such verdict, which said verdict, and the judgment thereupon to be pronounced as aforesaid, shall be binding and conclusive; and all such verdicts and judgments shall be registered by the clerk of the peace, and deemed records to all intents and purposes." These sections shew that there is a common law remedy in this case by debt on judgment. Debt may be brought on the judgment of an inferior or a foreign court; *à fortiori* on such a judgment as this. But the *mandamus* cannot, at all events, be necessary to recover the costs for which section 18 of the statute gives a specific remedy by distress and sale of the company's goods. Besides, it does not appear either that the

(*a*) 2 Doug. 524. (*b*) Vol. iii. 158. (*c*) 6 Mod. 27.

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costs have been taxed or that judgment has ever been entered up; and the costs of the former *mandamus*, at all events, cannot be recovered by this method. But the proceedings under the former *mandamus* were quite irregular. The jury have given damages for the injury done to Mrs. *Turner*, as tenant for life of the lands injured. All interests should have been considered, and damages given for the entire injury. Again, no notice in writing of the injury done was given within three months after it was done, according to the requisitions of the act. The sessions therefore had no jurisdiction. [*Patteson* J. and *Coleridge* J.—These objections should have been taken to the former rule.]

Sir *W. W. Follett* and *Bourne*, in support of the rule.—No action could be brought on this case, because the act itself appoints the remedies for any injuries done under its authority by the company; which circumstance would be an answer to any action. It is true that the verdict and judgment are to be registered among the records, and to be deemed records to all intents and purposes; that is, records of the Court of Quarter Sessions. But no action would lie on them. It never has been pretended that an action would lie on an order of filiation, or any other order of that Court. The proper remedy for disobedience to such an order is by indictment. An action will not lie even on a decree in equity. It does not create a debt. The case of *Rex* v. *Katherine Dock Company* (*a*) is not so strong as the present. Here there never was a debt due. The sum is claimed as compensation for an injury inflicted by the company acting under the authority of their act. In that case there had been a debt, an action, a verdict, and a judgment; the only defect was as to the execution. But even if there were a right of action, still it cannot be contended that the legislature contemplated so cumbrous a process as that the damages should be first assessed by a jury at sessions, and then an action brought on the judgment. It must have intended to simplify and render final the proceedings.—[*Patteson* J.—The legislature seem to have forgotten to say how the compensation was to be recovered, they say it is to be done as is "hereinbefore provided;" but on looking at the section referred to, I find there is no provision.] Therefore the Court will not drive the party to an action, when it is doubtful if it could be maintained. If no full and satisfactory remedy is ascertained to exist, a *mandamus* will always be granted. *Rex* v. *Severn and Wye Railway Company* (*b*), *Rex* v. *Thames and Isis Navigation Company* (*c*). As to the argument attempted to be drawn from the fact of Mrs. *Turner* being tenant for life, there is no affidavit to shew that such objection was taken at the trial. The fact is, it was distinctly put to the jury that the estate was for life, and it so appears on the face of the *mandamus*. It is also said, that the judgment is not entered up, but that is to be done by the Court, not by the party. The Quarter Sessions will be presumed to have done that. Even if judgment has not yet been entered up, the Court will allow time for the purpose. As to the costs, it is doubtful whether those incurred in the prosecution of a claim under section 20, which applies to damages done after the passing of the act, are to be recovered by distress under the 18th section. No mode of taxing costs is pointed

(*a*) 4 B. & Ald. 360. (*b*) 2 B. & Ald. 646. (*c*) Not yet reported.

out, and the magistrates have refused to issue their warrant. The amount is not disputed.

PATTESON, J. (*a*)—This is an application for a *mandamus* to the defendants, commanding them to pay Mrs. *Turner* the damages awarded her by a jury at quarter sessions, and costs. If this rule may be made absolute as to one part of it, we are clearly of opinion that we ought not to refuse to make it absolute for that part, because it also prays for something more, which cannot be granted. The object of the rule is to enforce payment both of the damages and costs. Now with respect to the costs, this rule must be refused; because either the party has no right to them at all, or the act of parliament has itself directed the mode by which they are to be recovered, namely, by distress and sale. It is true that the section which speaks of this method of recovering costs, does not relate to claims for injury done, as in this case, after the passing of the act, but to claims for purchase-money, and for damages which a person would sustain by the taking of his lands in the first instance. But the clause applying to this case says, that the damages assessed by a jury shall be recovered in the manner directed "with respect to such damages as are hereinbefore provided for," and says nothing at all about costs. Now the costs incurred with respect to the damages hereinbefore provided for, are recoverable by distress; and I think, therefore, that the costs incurred with respect to the damages assessed in such a case as the present, if they are recoverable at all, must be recoverable in the same manner. We cannot, therefore, make this rule absolute for a *mandamus* to pay the costs. With regard to the damages, I should feel great difficulty in making this rule absolute, if it appeared that there were any other clear and specific remedy. For some time during the argument I should have been very unwilling to have said that there was no such clear remedy, because it is expressly provided that the verdict shall be found by a jury at sessions, and that the sessions shall give a judgment; and then it is added, that such judgment shall be binding and conclusive to all intents and purposes. A subsequent section (15th) provides, that the verdicts and judgments, being first signed by the clerk of the peace, shall be registered among the records of the quarter sessions, and shall be deemed records to all intents and purposes. I thought, if this judgment were of record, that it might be enforced like any other judgment of record, namely, either by means of process from the particular Court of which it is a judgment, if it had any adequate process, or if it had no such process, by means of an action of debt in the superior Courts. But, on further consideration, I have great doubt on this point. I never yet heard of an action of debt on the ordinary records of that Court. This certainly is not an ordinary record of the Court, but made a record for the special purposes of this act. What sort of a record it may be, what may be the form of it, whether there are any pleadings, or whether the finding of the jury is merely reduced to writing, I do not know. It is difficult to say how an action could be brought in this Court on any such document, nor does it appear that the statute itself prescribes any special mode of recovering the amount of damages given to any party. The mode prescribed for recovering the damages in a case like the present, is by reference to the mode prescribed for recovering

(*a*) Lord *Denman*, C. J. was at the Privy Council.

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the purchase-money to be paid for lands taken; and when we refer to the proper clause to see what that is, we find that no mode is prescribed at all. There is to be a verdict for it and a judgment, and there the proceedings cease altogether, if such should be the pleasure of the company. The act simply directs, that when the purchase-money is paid, they shall be entitled to take possession, and that they shall not take possession until they pay it. It seems to have been considered sufficient that a party should retain his land unless his money were paid him. The legislature afterwards provides for a different subject, namely, for the compensation for any damages sustained, as in the present case, after the passing of the act; and says, that after such damages have been settled and ascertained by a jury, they shall be *levied* and applied in the same manner as thereinbefore directed with respect to the purchase-money. The word "levied" is here introduced for the first time. I suppose the legislature took it for granted there was some mode of levying the purchase-money. If the Court of Quarter Sessions were possessed of any process by which they could levy upon the judgment taken in this case, I should say that we ought not to direct the *mandamus*. I believe, however, that there is no such process. That Court has no officer to whom to direct the process,—no power to issue writs of *fieri facias* or *ca. sa.*, or *levari facias*, to enforce a judgment of this sort; nor can the judgment be removed by *certiorari* into this Court and enforced here. I am not aware of any authority that gives us power to receive such a document and enforce it. So that the word "levy," as used here, has really no meaning. The only way that remains by which the judgment can be enforced is by action of debt, and the main argument on the part of the company is founded on this suggestion. I am not at all prepared to say whether it can or cannot be enforced by action of debt. I certainly by no means am prepared to say it *cannot*, but I think it is by no means clear that it *can*. If that be so, I think, according to the ordinary practice of this Court, where there is no other clear remedy, we are bound to enforce the performance of what this act of parliament requires to be done by granting a *mandamus*. This writ, therefore, must go with respect to the sum awarded for damages. Some other objections have been taken to this rule, which are founded on the alleged irregularity of the previous proceedings in this matter. I do not understand that there are any affidavits on the part of the company which show that the proceedings have been actually irregular, but only that it is objected that the affidavits on the other side do not shew that every step was taken that ought to have been taken: that they do not shew that the judgment at the sessions was actually entered up, and that notice in writing was given within the proper period, stating the particulars of the injury or damage. I do not think we are now bound to inquire into these things. We must take it for granted that all those things *ritè esse acta*. The act directs a jury to be summoned to assess damages; and it appearing that the summons has been issued and obeyed, we ought, in granting this *mandamus*, to assume that every thing was done correctly under that summons. A further objection to this rule, and to the finding of the jury, has been made, that they ought to have been summoned to assess the damages sustained, not by the tenant for life only, but by every person interested in the land, and that the sum awarded ought to be divided by the jury, so much for the tenant for life, and so much for the persons in remainder. However that may be in a different case, where money is to be paid for the purchase

of lands, and where, the whole thing being taken, all persons, whether tenants for life or in remainder, whatever their interest, may be presumed to have some interest in the money to be awarded, it does not of necessity follow in this case, which is the case of injury done to lands, and on a different section, that any other person had a right to compensation except the tenant for life. The nature of the injury sustained may have been of a temporary nature only. The words of the section do not expressly extend to all persons having any possible concern in the injury done, but it says, "any person or persons who shall sustain any damage to his or their lands or hereditaments by reason of," &c. &c. Now this lady is in possession as tenant for life, and she says that she has sustained damage to her lands; they are her lands at present. If greater damages have been inquired into than the tenant for life ought to be compensated for, the proper limit to their investigation should have been pointed out to the jury. I do not find any thing to show that any objection was made to the way in which the chairman at the sessions left the questions to the jury, nor that they were not told to confine themselves to the case of tenant for life; or, if they did not so confine themselves, that they were not told to distribute the damages, so much to the tenant for life, and so much to those in remainder; nor that any objection was made either to the want of, or to the defects of the notice in writing of the amount of compensation claimed. As to the costs, they must be recovered in such manner as may be advised; it is clear they cannot be recovered by means of this *mandamus*, and the costs of the former *mandamus* are to be enforced, if at all, by attachment in the ordinary way, or they may be recovered under the act of parliament (*a*), which has lately given a mode of obtaining the costs of the proceedings on *mandamus*. The writ which we direct in this case, will be merely to compel payment of the sum of money found by the jury in that verdict, on which judgment has been given by the sessions.

WILLIAMS, J.—Agreeing as I do with the judgment of my brother *Patteson*, I shall give my judgment in a very few words. The question of costs may be disposed of very shortly. The amount of them ought to be precisely ascertained before we grant a summary remedy of this sort. As to the supposed irregularity, or want of jurisdiction of the sessions, I entertain no doubt at all that we ought to presume that the notice was proved before the inquiry began. Nothing to the contrary is shown. I can see nothing wrong in the form of the compensation awarded to the claimant in this case. But the principal question has been this, whether or not there is another full and efficient remedy. If there be any, we ought unquestionably not to grant this rule. That was the essential difficulty in the case. There is no difficulty at all with me on the subject of the levy by the Court of Quarter Sessions. There is no case where the payment of money by order of sessions has been enforced in any other manner than by indictment. The most important question therefore is, whether or not, where by a section of the act of parliament the judgment is directed to be made a record, and to be treated as a record to all intents and purposes, that is in itself a legislative declaration that there is a remedy by action of debt on that judgment. Now, regard being had to the Court of which the judgment is to be made a

(*a*) 1 *W.* 4, c. 21, s. 2.

record, and to the fact that it is a Court on a judgment of which no action has ever been brought, I doubt whether there can be any full or efficient remedy except by this writ of *mandamus*. It does seem to me questionable whether the legislature would have thought of putting a party to so circuitous and cumbrous a remedy as an action for the recovery of the very thing for which a summary remedy was intended by the very statute itself.

COLERIDGE, J.—As my brother *Patteson* has gone into this question very fully, and as I quite agree with him in the reasons he has given, I only wish to add a very few words on one or two points. The principle on which the writ of *mandamus* is granted is very well known. Two things must concur; a specific legal right, and the absence of any beneficial and effectual remedy for the enforcement of that right. We may divide this case into two questions, namely, the *mandamus* for the damages given by the verdict, and for the costs. These costs are again divisible into two parts; the costs of the rule on the former *mandamus* here, and the costs on the inquiry at the sessions below. If the principle I have laid down be applied to the costs of the former rule here, there is clearly an absence of a specific legal right, for until the Court has awarded the costs of the rule, there is no right in the party to have them. With regard to the other part of the costs, we do not know that there is any right to those costs. The act of parliament does not appear to have given by the section any right to costs at all. Here we are not dealing with a common law matter, but with something that is entirely a creature of the act of parliament, and the party must take his rights as they are given him by that act of parliament. In the absence of any distinct enactment, therefore, I think we are bound to refuse to make this rule absolute with regard to the costs. With regard to the 500*l.* damages, it must now be taken, after the issuing of the former *mandamus*, and after the verdict of the jury, that the party has a specific legal right to the 500*l.* But then has he any equally clear and beneficial remedy? It is suggested, that either this is a judgment which may be enforced as other judgments of the Court of Quarter Sessions are, or that it may be enforced by action of debt in one of the superior Courts. With regard to the enforcement of the ordinary judgment of a Court of Quarter Sessions, there is none but by indictment. That has been held in one case not to be equally beneficial, and it is clearly not an equally beneficial remedy, inasmuch as the only effect of the indictment would be punishment of the parties disobeying, and no fruits at all would be realised to the party so enforcing the judgment. As to the remedy by action, can any one say it is clear and certain that an action of debt may be brought on this judgment? We have been referred to general expressions used in *Blackstone's Commentaries*, but there is nothing like a decision or case in point. Who can doubt that if this action were brought that the objection might be made, and sustained by a great deal of argument, that no action would lie? As to the other points, they are scarcely worth mentioning. We must take it for granted, that as the former *mandamus* issued, and no return was made to it, and the party to whom it was addressed consented to obey it, that it was properly issued; and the party cannot afterwards, when another *mandamus* is sought for ancillary only to the former, and for the purpose of giving full effect to it, be allowed to contend, that it prayed for too much, and that it should not now be acted upon.

With regard to the proceedings at sessions, I think we are bound to presume that the Court below has done all that it ought properly to have done. If an act of parliament says that a jury are not to take notice of any ground of damage not specified in the notice given at a certain time, then, unless it appear distinctly that such notice has not been proved, or it having been proved that the jury were allowed to go beyond it, we must give credit to the Court below for seeing that the notice was properly given, and that the jury were instructed in compliance with that notice. As to the other points of the case, I will not dwell on them, as I entirely agree with the reasoning of my brother *Patteson* on them.

Rule absolute for a *mandamus* to pay the 500*l.* damages.
Rule discharged, as to the costs.

The KING *v.* MASHITER.

Jan. 13.

1. The word "inhabitants" has no fixed definite meaning in law, but varies according to the subject to which it is applied, or the instrument in which it may be used.

2. To obtain a rule for a *quo warranto* against a person elected to an office, on the ground that he had not the votes of the majority of the "inhabitants," it must be shewn what particular class of persons is intended by the word, and that he had not a majority of that class.

THESIGER, in *Easter* term, 1836, had obtained a rule *nisi* for a *quo warranto* against the defendant, to shew by what authority he exercised the office of a justice of the peace for the liberty, lordship, or manor of *Havering atte Bower*, in the county of *Essex*. It appeared from the affidavits upon which the rule was obtained, that by a charter of 5 *Edw.* 4, (reciting that the said lordship or manor was of ancient demesne, and that all real and mixed actions concerning the lands there were immemorially accustomed to be pleaded in the court of the said manor, before the steward and suitors of the same for the time being, and that the *tenants and inhabitants* of the said manor had been much harassed by suits in other courts out of the said lordship,) the privilege was granted to the said *tenants and inhabitants*, that they should not be sued in any actions in any other court than in that before the said steward and suitors. The charter then proceeded as follows:—"And his said majesty, furthermore of his more abundant grace, did grant unto the aforesaid *tenants and inhabitants*, and to their successors, that the steward of the said manor for the time being, so long as he should continue in the said office, and one of the discreetest and honestest tenants or inhabitants aforesaid, to be from time to time chosen by them, the tenants and inhabitants, and their successors, should be for his said majesty and his heirs, justices of the peace, and keepers of his peace, to be kept within the said manor of *Havering* aforesaid." The charter contained also a grant of a fair and of a court of *pie poudre* to the same tenants and inhabitants. Subsequent charters, the last of which was granted in the second year of *James* 1, were set out, confirming the above privileges. The affidavits then stated, that on the 11th *February*, 1836, a court of ancient demesne was held for the purpose of electing a new justice of the peace, in the room of a former justice, who had resigned: that the only candidates were the defendant and a Mr. *Hancock:* that a shew of hands, which had been called for, was in favour of the latter: that a poll was then demanded, and that at the polling several persons, who had tendered their votes as inhabitants of the manor, were not allowed to vote, on the ground that they were not householders or occupiers within the manor. The result of the poll was in favour of the defendant, but it was admitted that there would have been a

majority of eight in favour of his opponent, if the votes above mentioned had not been disallowed. There was no instance of a poll having taken place at any previous election; but several entries were set out from books, containing the records of former elections, and the signatures of the persons who had voted on those occasions. Many of these persons, it was sworn by old inhabitants, were neither householders nor occupiers within the manor. It did not appear, however, that there had been any contest or scrutiny at these elections.

Sir *W. W. Follett*, now shewed cause.—The question turns upon the meaning of the word "inhabitants" in the charter of *Edw.* 4. The word in ancient charters never means mere residents, not possessed of any qualification; it always means occupiers at least, and often occupiers contributing to the burdens of the place. The grant here is to "tenants and inhabitants," and the manor being of ancient demesne, it is probable that those inhabitants only who are tenants are thereby intended, as in *Fearon* v. *Webb* (*a*). But the party applying for the *quo warranto*, and contending that he had at the election a majority of "inhabitants" in his favour, should at all events put his own construction upon the word, as used in this charter, and then shew that he had a majority according to that construction. The defendant having been elected, is in possession of his office by a good *primâ facie* title, and the onus is cast, therefore, on the other side to prove that he has been unduly elected. This title can only be impeached by shewing what definite class of persons had the right of voting at the election, and that the defendant had not a majority of that definite class; for the word "inhabitants" has no definite meaning at all. It varies according to the subject to which it is applied, or the context of the instrument in which it is used, and it would be very difficult to assign perjury upon any affidavit in which its meaning became material. By 22 *Hen.* 8, c. 5 (*b*), power is given to justices to tax inhabitants towards the repair of bridges. *Coke*, commenting upon this statute, says, the word "inhabitant" is the largest word of the kind, and that a person is an inhabitant in a place for the purposes of that statute without bodily residence. Again, in *Rex* v. *Adlard* (*c*), where the word was considered with reference, not to liability to pecuniary charge, but to the performance of personal service, it was held, that a person occupying a house in a parish, in which however he did not sleep, was not liable to serve as constable in that parish. Some charters give inhabitants the power of electing the clergyman of the parish, and the question of their meaning has been often before the Courts of Equity, but they have never held that any persons who were not at the least occupiers, were intended by the term; *Attorney-General* v. *Parker* (*d*), *Attorney-General* v. *Forster* (*e*). Some light may be thrown upon the use of the word in this case by reference to the ancient qualification of those by whom public officers were chosen; namely, by freeholders. Coroners were so chosen, and justices of the peace, before 1 *Edw.* 3, c. 16, and members of parliament.—[Lord *Denman*, C. J.—Were members of parliament chosen by freeholders before 8 *Hen.* 6, c. 7? If so, why did that statute pass?]—That act confined the franchise to the

(*a*) 14 Ves. 13.
(*b*) 2 Inst. 702.
(*c*) 4 B. & C. 772.
(*d*) 3 Atk. 576; *S. C.* 1 Ves. sen. 43.
(*e*) 10 Ves 335.

40*s.* freeholders, but it is apprehended that freeholders of smaller substance enjoyed the franchise before the statute. The word "inhabitants" then having many significations, the affidavits on the other side should have stated what is its proper signification in this charter, and that the defendant had not a majority according to that signification. Does it mean persons resident in the manor, including women, servants, and children? It should be sworn the defendant had not a majority of them. If any interpretation had been given to the term, the defendant would have had something to meet, by shewing in answer that the interpretation given was erroneous, or that he had a majority of the persons entitled to vote, even according to the interpretation given. But at present, unless post-boys passing through had a right to vote, as formerly was the case at *Preston* on an election for a member of parliament, and beggars and all other persons who happened to be in the manor at the time of polling, the title of the defendant to his office is not invalidated.

Thesiger, contrà.—Mr. *Hancock* has a right to have the word "inhabitants" in this charter interpreted in the largest sense which it will admit of, independently of any custom restraining it. The persons whose votes were rejected in this case were inhabitants, although not occupiers or householders. Is there any thing in the charter, or any usage to restrict "inhabitants" to the narrow sense contended for? At previous elections the franchise appears to have been exercised by all inhabitants. In *Attorney-General* v. *Forster* (*a*), Lord *Eldon* said of the word in question, no word "is more capable of a larger or more limited interpretation." Undoubtedly no word is more liable to be acted upon by usage. Lord *Hardwicke* also, in *Attorney-General* v. *Parker* (*b*), said, "In the construction of ancient grants and deeds, there is no better way of construing them than by usage, and *contemporanea expositio* is the best way to go by." So also *Lawrence*, J. in *Withnall* v. *Gartham* (*c*). Here, either there is no usage at all to restrain the word, or a positive usage in favour of giving to it its fullest sense.—[*Coleridge*, J.—What do you say is that fullest sense, in the absence of all usage?]—In-dweller.—[*Coleridge*, J.—How long must he have been an in-dweller? Would it be enough that he came in the manor the night before the election?]—It would, if he came *animo morandi;* which would make a pauper removeable as a person coming to settle; *Rex* v. *Woolpit* (*d*). The context of the charter itself shews that the inhabitant intended need not be a householder or occupier. A privilege is granted to the inhabitants of being sued in the manor court only, in all kinds of actions, whether real or personal. Tenants in ancient demesne certainly cannot be intended, for they had the privilege without the charter. The privilege is evidently granted for the benefit of the population at large; so also is the privilege of holding a fair. Lord *Coke* (*e*), in speaking of the institution of courts leet for the benefit of "tenants and resiants," seems to employ those words just as "tenants and inhabitants" are employed in this charter; and it is probable that the manor court here spoken of was designed for the general benefit of the tenants and inhabitants, in the same way as the court leet with respect

(*a*) 10 Ves. 339.
(*b*) 3 Atk. 576; *S. C.* 1 Ves. sen. 43.
(*c*) 6 T. R. 398.
(*d*) 4 Ad. & Ell. 205; *S. C.* 1 Har. & Woll. 483.
(*e*) 2 Inst. 71.

to the tenants and resiants. But it is said that the word "inhabitants," standing by itself, has no meaning; yet it has been held (*a*), if the queen by her charter were to grant land to the good men of *Islington*, that this would make them a corporation; and in *Co. Litt.* 3 *a.*, it is said the parishioners or inhabitants of *Dale* are not capable to purchase goods. The word seems also to have been used as if intelligible by itself, in *Russel* v. *The Men of Devon* (*b*), and in the 4 *Inst.* 297. At all events, if the word "inhabitants" be ambiguous and obscure, the word "occupiers" is no less so.

Lord DENMAN, C. J.—I am not prepared to put any exclusive meaning on the word "inhabitant" in this charter. I do not see that a person must necessarily be an occupier or householder to be entitled to vote. But the objection made in the course of the argument, namely, that before a *quo warranto* can be granted to dispossess a person, who has been *bonâ fide* elected to an office, a clear right must be shewn in some other person, has not been answered. This objection is fatal to the claim of the relator, who tells us generally that he was elected by a majority of those, whom he describes as inhabitants and good legal voters, although they were not occupiers or householders. This statement leads us to the construction of the word "inhabitant," and I cannot help saying that its legal meaning is so very uncertain, that it is quite necessary that the party applying for this rule should have put his own construction upon it, and then stated facts to shew that according to the usage at these elections his construction is correct. Unless this be done, his claim is defective in its very foundation, and no question is brought before us which we can possibly order to be tried; for the attempt to make out that the word "inhabitant" has in law any definite meaning, has entirely failed. Mr. Justice *Lawrence* (*c*) does, it is true, speak of the full sense of the word, but does not say what that full sense is; nor was it necessary that he should enter into so general a question. The case of *Russel* v. *The Men of Devon* (*b*) throws no light whatever upon the subject before us, but merely decides that no action will lie at the suit of an individual against the inhabitants of a county for an injury sustained by him in consequence of the non-repair of a bridge. I think, therefore, we should not be justified, under the circumstances, in disturbing the defendant in the possession of his office, and that this rule must be discharged.

LITTLEDALE, J.—It is very difficult to say what is the legal meaning of the word "inhabitants." In the Statute of Bridges it means occupiers; but there are cases where it may mean merely residents, or even persons who happened to be in a parish for the time, as in the case of a way granted over a field to the parish church. In many cases it may be explained by usage, or by the object, intention, or context of the instrument in which it is found. I think Mr. *Thesiger* ought to have shewn what was the situation or character of those persons who claimed to vote, and then the Court would have seen whether they were inhabitants within the meaning of this charter.

WILLIAMS, J.—I am of the same opinion. We ought not to disturb the defendant in the possession of his office, unless good ground be given us for

(*a*) Dyer, 1002. (*b*) 2 T. R. 667. (*c*) *Withnall* v. *Gartham*, 6 T. R. 398.

believing that he was not properly elected. This should have been made out in one of two ways, either by setting out the description of those persons whose votes were rejected, and then stating facts from which it would appear that their votes ought to have been received; or by shewing that the word "inhabitants" has a certain definite meaning, necessarily comprehending all those persons whose votes were rejected. Now the word has most unquestionably no certain or definite meaning at all. The Statute of Bridges is conclusive upon that point. There, to constitute inhabitancy, bodily residence is not at all necessary. Here it is sought to construe inhabitancy to signify bodily residence, and nothing else.

COLERIDGE, J.—I take it to be quite clear that, before this rule can be made absolute, the party who applies for it should establish a clear *primâ facie* case, and shew that which, if unanswered, would entitle him to fill this office. The question is, whether that has been done in this case. All the defendant states is, that he has a majority of persons believed to be inhabitants, not actually householders or occupiers, and objected to on that ground. Mr. *Thesiger*, who does not deny that the burden of proof falls on him, says he has discharged himself of it in one of two ways. First, he says that he has made use of a term, namely, "inhabitants," which in the absence of all restraint by custom, by context, or by the object of the instrument in which it is to be found, has a certain definite meaning, and that, as there is no usage in this case, the Court must understand that term in its full legal meaning. But I cannot agree with him that this term has any definite legal meaning. Any lawyer asked to explain its meaning would require to know how it was used, in what instrument, and with reference to what object. Then he says, even if the meaning of the word varies with the instrument employing it, the context and object of this charter show that the word should be taken in its most extended meaning, to include all persons who were in the manor *animo morandi*. Even if this view of the charter be correct, the affidavits in support of this rule should have shewn that Mr. *Hancock* had a majority of such voters as had come into this manor *animo morandi*, and were not merely passing through it, or casually present in it. He would thus have given the other side an opportunity of meeting him on that point. That defect in his case is enough to dispose of this rule; but I do not agree that the context and object of this charter do so clearly establish this construction of the charter to be correct.

Rule discharged (*a*).

(*a*) See the next case.

The KING *v.* The Governors of SANDFORD CHAPEL.

SIR *F. POLLOCK*, in *Michaelmas* term, 1836, obtained a rule *nisi* for a *mandamus* to three of the Governors of the church of *Crediton*, otherwise

1. A charter of *Edw.* 6, granted to certain governors and their successors the right of nominating and appointing a chaplain, *multorum assensu majoris partis inhabitantium*:—*Held*, that it was not necessary that the inhabitants should take any part in the nomination itself, but that they might be called upon, after it had been completed by the governors, to express their assent or dissent to it, as a separate act.

2. The word "inhabitants" having no fixed meaning in law, may, by the usage at elections under a charter, be restricted to the signification of "resident rate payers."

King's Bench.

The KING v. The Governors of SANDFORD CHAPEL.

called *Kyrton*, commanding them, with the assent of the inhabitants of the ville or hamlet of *Sandford*, to nominate and appoint a chaplain to the chapel of *Sandford* aforesaid, in the room of *Hugh Bent*, clerk, deceased.

A charter of *Edw.* 6, which was written in Latin, incorporated twelve persons, inhabitants of the parish of *Crediton*, three of whom were to be of the village of *Sandford*, to act as governors of the hereditaments and goods of the church of *Crediton*, and then proceeded:—"Et volumus, ac per præsentes declaramus et ordinamus, quod illi tres dictorum duodecim gubernatorum qui ex parte villatæ de Sampford prædicta de tempore in tempus fuerint, *undcum assensu majoris partis inhabitancium* ejusdem villatæ de Sampford, nominabunt et appunctuabunt, ac nominare et appunctuare valeant et possint, unum capellanum ad divina servicia ac sacramenta et sacramentalia ministrandum in capellâ de Sampford prædictâ, pro *inhabitantibus* villatæ et hameletti de Sampford prædictæ," &c. &c.

Upon the death of Mr. *Bent*, the three present governors of the chapel of *Sandford*, without the assent of the major part of the inhabitants of *Sandford*, nominated Mr. *Gregory* as his successor. They then, by notice, dated the 18th *June*, 1836, announced to the inhabitants of the said ville the nomination so made, and required them to meet in the chapel on the 26th instant, in order that they or the major part of them might assent or dissent to such nomination. At the meeting, which took place at the time appointed, one of the governors took the chair, and the assent or dissent of each *resident rate-payer*, who answered to his name on its being called over, having been declared, the numbers were, assents 39 and dissents 32. It was then proposed that two other classes of inhabitants should be also called upon to express their assent or dissent, namely, the *non-resident rate-payers and the non-rated residents*. The votes of five non-rated residents were tendered as dissentients, and it was stated that many inhabitants of the same description were present and ready to give their votes in the same way. The chairman, however, refused to take their votes, and declared Mr. *Gregory* duly elected. Affidavits in opposition to the rule were made by several old inhabitants, who stated that they remembered two prior elections, one in 1771, and the other in 1814, at both of which the proceedings had been conducted as at the election in question; that the governors alone nominated, and that the rated inhabitants *afterwards* expressed their assent or dissent, in conformity with what had always been understood by them to be the usage. Affidavits were also made by the three governors, their clerk, and the vestry clerk. It appeared that by another part of the charter, the inhabitants were also to elect the chapelwardens, and that the usage had always been that none but rate-payers voted in their election. It appeared also that proceedings relative to the validity of an election of chaplain of *Sandford* had been carried on in the Court of *Chancery*, from the year 1730 to 1741 (*a*). At one election one candidate had been elected by two of the governors and a minority of the inhabitants, and the other by one of the governors and a majority of the inhabitants. Lord *Hardwicke*, by a decree of the 25th of *July*, 1837, declared neither candidate duly elected, and ordered that the three governors "should proceed to nominate a chaplain, and should thereupon give notice to the village of *Sandford*, to meet on the Sunday se'nnight after such nomination,

(*a*) In a suit of the *Attorney General* v. *Davie and others*, governors, &c.

to assent or dissent to such nomination (*a*)." Another decree of the 20th of *January*, 1741, reciting that two of the governors had nominated a chaplain without notice to the third governor, directed the governors to nominate a chaplain according to the charter and decree last mentioned, and declared "that the right of assenting or dissenting to such nomination was only in the inhabitants of the said hamlet paying the rates and assessments for the poor and chapel within the said hamlet." Another decree (*b*) of the 27th of *July* in the same year, after reciting that in pursuance of the above decrees, the said governors had proceeded to the nomination of a chaplain, that two of them had nominated *William Barter*, but that the other refused to concur in this nomination; that thereupon the two governors gave notice to the inhabitants to assent or dissent to their nomination; that afterwards "all or much the greatest part of the inhabitants within the said hamlet of *Sandford*, who were payers, or owners or occupiers of lands charged to the rates and assessments of *Sandford*" had assented to the nomination, decreed that the person nominated was duly elected, and that he should be admitted accordingly.

Sir *W. W. Follett* and *M. Smith*, now shewed cause.—This rule must be discharged, according to *Rex* v. *Mashiter* (*c*). It is contended, in support of this rule, as of the rule in that case, that inhabitants who had a right to vote were not allowed to do so; but the affidavits on the other side do not suggest any definite class of inhabitants in whom that right is vested. Two objections are made to the validity of Mr. *Gregory*'s election. 1. That the mode of nomination was wrong. 2. That legal votes were rejected. It is said in the first place, though no such objection was made at the election, that according to the words in the charter "*unâcum assensu* majoris partis inhabitancium nominabunt," the assent of the inhabitants should be contemporaneous with the act of nomination. But the mode of nomination is supported both by usage and the decrees of the Court of *Chancery*. Nor can the word "unâcum" be applied very well to the nomination, which must be the act of the governors only. The proper sense of the passage is, that the governors are to nominate, and then the inhabitants, *together with them*, are to appoint. The charter does not say that the governors *and* the inhabitants are to nominate, but the governors are to nominate with the assent of the inhabitants; and this direction has been complied with, for if a majority had expressed dissent to the nominee, then the governors would have had to nominate some other person. Again, usage and the decrees of the Court of *Chancery* are in favour also of receiving the votes of such inhabitants only as were rate-payers. To this effect is the decree of Lord *Hardwicke*, of *January* 20, 1741, before whom this very point was made, after depositions had been read and witnesses examined to establish the fact of ancient usage. This decision is referred to in the *Clerkenwell* case (*d*), in which a similar question was several times under the consideration of the Court of *Chancery*. The rate-payers likewise are the persons who elect the chapelwardens under the charter. Even if the non-resident rate-payers had been admitted to vote, the result

(*a*) *Chichester*, Bart., *Reed*, and *Tremlett*, Governors, &c., and the *Attorney General*.
(*b*) *The Attorney General* v. *The Twelve Governors, &c., Davie and others*, 2 Atk. 212; and referred to in the *Attorney General* v. *Parker*, 3 Atk. 576, and 1 Ves. sen. 43.
(*c*) *Ante*, 173.
(*d*) *Attorney General* v. *Parker*, 3 Atk. 576. S. C. 1 Ves. 43.

King's Bench.

The KING v. The Governors of SANDFORD CHAPEL.

of the election would have been just the same, for only five of them made any claim, and Mr. *Gregory* had a majority of seven.

Sir *F. Pollock* and *Rogers*, in support of the rule.—The force of the recent decision in *Rex* v. *Mashiter* (*a*) must be admitted; but the objection here is, that the nomination being improper, the election never had any legal commencement. The word "unâcum" obviously means more than the privilege of assenting to a previous nomination by others; it imports unity of action, and that the inhabitants are to participate in the nomination itself, or at all events that they are to have the opportunity of expressing their opinions upon it at the very time it takes place. There is no proof of any ancient usage that rate-payers only may vote at the election. Lord *Hardwicke* (*b*) himself, in the *Attorney General* v. *Parker*, said there was no proof of any usage in this case. The declaration of Lord *Hardwicke*, that the right of voting resided in the inhabitants paying poor-rates within the hamlet, is a mere dictum, the right itself was never discussed in any of the cases referred to. He certainly suggested a course to be pursued at the elections, which has been pursued up to the present time; but that is not enough to establish the usage contended for. There can be no valid usage in this case for persons paying poor rates to have the exclusive right of voting, because the charter was granted fifty years before the 43d *Eliz.*, by which statute parishes were first regularly assessed to the relief of the poor. In the *Attorney General* v. *Newcombe* (*c*), Lord *Eldon*, observed that Lord *Hardwicke* thought that in determining upon the validity of an election "he was not to state rules and regulations for the future conduct of a parish." If there was no such custom, as alleged on the other side, in the time of Lord *Hardwicke*, it was not competent to the governors or the inhabitants to restrict the right of voting under the charter by any regulations of their own. In *Faulkner* v. *Elgar* (*d*), where the question was as to the proper mode of electing a perpetual curate, it was held that the parishioners at the time of meeting had no right to restrict the privilege of being electors to the payers of church-rates. In *Arnold* v. *The Bishop of Bath* (*e*), it was held, that an allegation of a custom in parishioners to elect a curate is not supported by proof of such a custom in parishioners paying church-rates. *Bempde* v. *Johnstone* (*f*) may be referred to for an explanation of the word "inhabitants," namely, that they are those who adopt a "place of residence with a fixed purpose of remaining, and which cannot be referred to an occasional or temporal purpose either of pleasure or of business."

Lord DENMAN, C. J.—This is an application for a *mandamus* to the Governors of *Sandford* Chapel, to compel them to elect a chaplain, on the ground that the election which has taken place was altogether void, and that the situation is now vacant. The first objection offered to the present appointment is, that the nomination did not receive the assent of the inhabitants in the manner required by the charter. It is said, that by the words "unâcum assensu inhabitancium," it is clearly directed that the inhabitants themselves are to take part in the nomination, and that it is not sufficient

(*a*) *Ante*, 173.
(*b*) 1 Ves. sen. 43.
(*c*) 14 Ves. 1.
(*d*) 4 B. & C. 449.
(*e*) 5 Bingh. 316.
(*f*) 3 Ves. 201.

they should assent to it, after notice that it has already been made by the governors. I think there is no weight whatever in this objection. The privilege of dissenting from the nomination after notice gives the inhabitants ample control over the nomination, which must be made anew if they disapprove of it; and gives them also a convenient interval, during which they may make inquiry into the character and fitness of the person proposed to them. With regard to the class of individuals to whom the right of election is intrusted by the charter, we have very lately decided (*a*) that the word "inhabitants" must be explained by the circumstances of the particular case, by usage, or the context of the instrument in which it is found. The usage in this case has been for those only who are rate-payers to elect. It is said, this usage has not been proved, and that it could not have had any legal commencement, because rates for the relief of the poor were not imposed until fifty years after the date of this charter. But I apprehend that poor-rates, or something very like them, were in existence many years before the 43d of *Elizabeth* (*b*). I think there is every reason to suppose that the usage was proved before Lord *Hardwicke*, and that the same point which is now raised was in issue before him; and it is not disputed that the practice at these elections, ever since the decrees pronounced by him, has been in strict conformity with his directions.

WILLIAMS, J. (*c*)—I see nothing in the words "unâcum, &c." to shew that the acts of nomination and assent are to go on together *pari passu;* nor has any usage been set up in support of such a construction. All the usage indeed is against it. I quite agree with the observations of my lord upon the proper rule for the interpretation of the word "inhabitants;" and am of opinion that the validity of this election stands unimpeached.

Rule discharged (*d*).

(*a*) *Rex* v. *Mashiter, ante*, 173.
(*b*) See 27 *Hen.* 8, c. 25; 5 & 6 *Edw.* 6, c. 2; 5 *Eliz.* c. 3, and other statutes in the earlier part of the same reign.
(*c*) *Littledale*, J. was absent from illness; *Coleridge*, J. sat in the *Bail Court*.
(*d*) See the preceding case.

PRACTICE TO BE OBSERVED ON TRIALS FOR FELONY, WHERE THE PRISONER HAS COUNSEL.

At a meeting of the Judges, for the purpose of choosing the Spring Circuits of 1837, (*Littledale*, J., *Bosanquet*, J., and *Coleridge*, J., being absent from indisposition), the following course of practice on criminal trials was laid down, in consequence of the recent act for allowing prisoners, indicted for felony, to make full defence by counsel.

1. That where a witness for the crown has made a deposition before a magistrate, he cannot, upon his cross-examination by the prisoner's counsel, be asked whether he did or did not, in his deposition, make such or such a statement, until the deposition itself has been read, in order to manifest whether such statement is or is not contained therein; and that such deposition must be read as part of the evidence of the cross-examining counsel.

2. That, after such deposition has been read, the prisoner's counsel may proceed in his cross-examination of the witness as to any supposed contradiction or variance between the testimony of the witness in Court and his former deposition; after which the counsel for the prosecution may re-examine the witness, and after the prisoner's counsel has addressed the jury, will be entitled to the reply. And in case the counsel for the prisoner comments upon any supposed variance or contradiction, without having read the deposition, the Court may direct it to be read, and the counsel for the prosecution will be entitled to reply upon it.

3. That the witness cannot, in cross-examination, be compelled to answer whether he did or did not make such or such a statement before the magistrate, until after his deposition has been read, and it appears that it contains no mention of such statement. In that event, the counsel for the prisoner may proceed with his cross-examination: and if the witness admits such statement to have been made, he may comment upon such omission, or upon the effect of it upon the other part of his testimony; or if the witness denies that he made such statement, the counsel for the prisoner may then, if such statement be material to the matter in issue, call witnesses to prove that he made such statement. But in either event, the reading of the deposition is the prisoner's evidence, and the counsel for the prosecution will be entitled to reply.

4. If the only evidence called on the part of the prisoner, is evidence to character, although the counsel for the prosecution is entitled to the reply, it will be a matter for his discretion whether he will use it or not. Cases may occur in which it may be fit and proper so to do.

5. In cases of public prosecutions for felony, instituted by the crown, the law officers of the crown, and those who represent them, are, in strictness, entitled to the reply, although no evidence is produced on the part of the prisoner.

END OF HILARY TERM.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF KING'S BENCH

AND

BAIL COURT,

IN

Easter Term, 1837.

Fox *v.* M'Culloch.

Bail Court.

Issue was joined in a *London* cause in *August*; the plaintiff obtained an order for a writ of trial in *October*, but no notice of trial was given:—*Held*, that the defendant could not move for judgment as in case of a nonsuit in *Hilary* Term.

ISSUE was joined in this cause, which was a *London* cause, on the 8th *August* last, and no notice of trial had been given. On the 25th *October* the plaintiff obtained a writ of trial. In *Hilary* Term the defendant had a rule *nisi* for judgment as in case of a nonsuit.

Heaton, in that term, shewed cause, and contended that the rule was moved for too early; *Wingrove* v. *Hodson* (*a*), *Heale* v. *Curtis* (*b*), *Williams* v. *Edwards* (*c*).

Chilton, *contrà*, contended that it was not too early, being a town cause. He referred to a case decided in this Court by *Littledale*, J., not reported (*d*), and argued that the rule of *Hilary* Term, 2 *Will.* 4, I. 70 (*e*), making it unnecessary to enter the issue, had altered the practice in these cases, and that at any rate it was not too early after the plaintiff had obtained a writ of trial.

Patteson, J.—As the Court of *Exchequer* have taken time to consider this question (*f*), I shall wait for their decision.

Cur. adv. vult.

Williams, J., this term, (*May* 2d,) gave judgment.—This was a case argued before my brother *Patteson* last term. Issue was joined on the 8th

(*a*) 4 Tyr. 328; 2 Dowl. P. C. 379.
(*b*) 5 Dowl. P. C. 294; 2 Mees. & Wels. 76.
(*c*) 1 Cr. M. & Ros. 583; 3 Dowl. P. C. 183; 5 Tyr. 177.
(*d*) The case of *Robinson* v. *Taylor*, 2 Har. & Wol. M. T. 1836.
(*e*) 1 Dowl. P. C. 192.
(*f*) In the case of *Gough* v. *White*, 1 Mur. & Hurl.

Fox v. M'Culloch.

of *August*, no notice of trial was given, and application was made in *Hilary* Term for judgment as in case of a nonsuit. My brother *Patteson* has considered the case, and has also conferred with the other judges on the subject. It was supposed that the late rule had made some difference as to the practice in these cases, but my brother *Patteson* says, that, on consideration, he thinks it has not, and that therefore the rule for judgment as in case of a nonsuit, moved for in *Hilary* Term, was premature. This rule must therefore be discharged.

Rule discharged, without costs (*a*).

(*a*) See the next case, and also *Robins* v. *East*, *ante*, 74, and *Revett* v. *Hutchinson*, *post*, T. T. 1837.

STACEY *v.* JEFFRYS.

Issue was joined in *February*, and the next day the plaintiff obtained an order for a writ of trial. No notice of trial was given, and several days on which the sheriff held his Court passed by:—*Held*, that a rule for judgment as in case of a nonsuit could not be moved for in *Easter* Term.

ISSUE was joined in this cause on the 2d *February* last, which was in *Hilary* vacation. On the 3d *February*, the plaintiff obtained an order to try the cause before the sheriff. The sheriff had since held several courts for the trial of causes, but no notice of trial had been given. In this term a rule *nisi* for judgment as in case of a nonsuit was obtained; against which

Archbold, shewed cause.—There having been an order to try this cause before the under-sheriff will not distinguish it from any other case, and this rule is therefore moved for too early; *Harle* v. *Wilson* (*b*), *Butterworth* v. *Crabtree* (*c*), *Wright* v. *Skinner* (*d*).

George, *contrà*.—The plaintiff, by obtaining an order to try the cause before the sheriff, has taken a step in the cause, and therefore has no right to allow several days, when he might have tried the cause before the sheriff to pass by without proceeding. There was a case argued last term in the Court of *Exchequer*, of *Gough* v. *White* (*e*), as well as the case of *Fox* v. *M'Culloch* (*f*), argued last term in this Court, in neither of which judgment has yet been given. Those judgments will affect the present case.

Cur. adv. vult.

WILLIAMS, J. afterwards (*May* 8th,) gave judgment.—The facts of this case are similar to those of the case of *Fox* v. *M'Culloch*, in which I consulted with my brother *Patteson*. I have no doubt but that this case must be governed by that decision, and this rule must therefore be discharged, but without costs, as it was a question of some doubt.

Rule discharged, without costs.

(*b*) 1 Gale, 139; 3 Dowl. P. C. 658.
(*c*) 3 Dowl. P. C. 184; 1 Cr. M. & Ros. 519; 5 Tyr. 149.
(*d*) 4 Dowl. P. C. 727; 2 Cr. M. & Ros. 746; 1 Tyr. & Gr. 69.
(*e*) 1 Mur. & Hurl.
(*f*) *Ante* p. 183.

The KING *v.* RATTISLAW.

THIS was a rule to shew cause why a *certiorari* to bring up an order of the justices of *Warwickshire*, made at the last *Midsummer* Quarter Sessions in the matter of an appeal by *Rattislaw* against the overseer's accounts of the parish of *Rugby*, should not be quashed. Previous to the *certiorari* being obtained, notice was given to one of the justices who was present on the hearing of the appeal, and to another justice of the county who was not present. The *certiorari* was delivered on the 18th *October* last. A rule to shew cause why the *certiorari* should not be quashed having been obtained on the part of the respondents in the appeal on the 18th *January*, which was in *Hilary* Term last,

1. The notice required by 13 *G.* 2, c. 18, s 5, previous to removing an order of justices at Quarter Sessions by *certiorari*, must be given to two justices who were present in Court when the order was made.

2. A rule to quash the *certiorari*, on the ground that such notices were not given, may be made absolute, although the objection is made so late that a fresh *certiorari* cannot be obtained.

3. The respondents in an appeal, in which the order of justices was made, may take that as a ground of objection to the *certiorari*.

Waddington, in that term, shewed cause.—One objection made to this *certiorari* is, that there was not sufficient notice to the justices, as required by stat. 13 *G.* 2, c. 18, s. 5, one of those on whom it was served not having been present at the Court of Quarter Sessions at which the order was made. It is submitted, however, that there was sufficient notice, and that notice to any two justices of the county, whether present or not, was sufficient, the order being the order of all the justices of the county, and not of those only who were present. Even if this was not sufficient notice, still it is now too late to make this objection. The *certiorari* was delivered on the 18th *October* last, and all *Michaelmas* Term, and a great part of the present term, has been suffered to elapse before this rule was moved for. The object of this delay has been to allow the six months to expire within which time a *certiorari* must be moved for, and so to prevent a fresh *certiorari* being granted if this is set aside. That is a hard case on the parties really interested in this appeal. These objections ought moreover all to have been made on the rule *nisi* to grant the *certiorari*. Another ground for discharging the present rule is, that it is not competent to the respondents in this appeal, who are third persons, to make any objection to the sufficiency of the notice to the justices. The case of *Daniel* v. *Phillips* (*a*) is an analogous case to support that position (*b*).

Miller and *Daniel*, *contrà*.—The act is express that notice must be given to two justices who *made the order*, and it cannot possibly be contended that a justice who was absent made it. The case of *The King* v. *Nicholls* (*c*) is an answer to the point made of the delay in applying for the present rule. *The King* v. *Wakefield* (*d*) is to the same effect. The case of *The King* v. *The Justices of Kent* (*e*) bears in some respects on the present, and is a strong case, being one of fraud. *The King* v. *The Justices of Sussex* (*f*) shews the necessity of the notice being given as directed by the act. It does not appear but that the rule for the *certiorari* was absolute in the first instance, so that it may have been impossible for the respondents in the appeal to have shewn cause against it. The case of *Daniel* v. *Phillips* does not apply,

(*a*) 4 Term Rep. 499.
(*b*) There were other points argued, which it is unnecessary to notice, as they were not decided by the judgment given.
(*c*) 5 Term Rep. 281, n.
(*d*) 1 Burr. 488.
(*e*) 3 Barn. & Adol. 250.
(*f*) 1 M. & Sel. 631, 734.

Bail Court.
The KING v. RATTISLAW.

as the respondents on whose behalf the present rule was obtained were the persons really interested in this matter, and cannot be considered as third persons. The justices themselves may, moreover, have been interested to support their own order, and the intention of the act of parliament was clearly to give them the opportunity to do so.

Cur. adv. vult.

PATTESON, J. this term (*April* 26th) gave judgment.—This was a case argued last term on a rule to shew cause why a *certiorari* should not be quashed. The *certiorari* was to remove an order of Quarter Sessions. The *certiorari* had been issued and served, and the motion for quashing it was made on the ground that the original notice of the application for the *certiorari* was incorrect, as it had been wrongly served. The notice had been previously served on one of the justices who was present at the hearing of the case by the Court of Quarter Sessions, and on another justice who was not present. Now the statute 13 *Geo.* 2, c. 18, s. 5, provides that no writ of *certiorari* shall be granted "unless it be duly proved on oath that the said party or parties suing forth the same hath or have given six days' notice thereof in writing to the justice or justices, or to two of them, by and before whom such conviction, judgment, order, or other proceedings, shall be so had or made, to the end that such justice or justices, or the parties therein concerned, may shew cause, if he or they shall so think fit, against the issuing or granting such *certiorari*." The contention on this rule was, whether the notice had been sufficiently served within the meaning of that act. Mr. *Waddington* argued that it had been, and was obliged to contend that it would have been sufficient to have served it on any two justices of the county. That is a very strong proposition. I have not been able to find any authority on the point, yet I am satisfied that the meaning of the act is, that the service should be on two of the justices by whom the order was made, and who were present at the time. In this case one of those served was not present, and therefore I think the service was bad. There were several other objections argued, which it is not necessary to determine, as the rule must be made absolute on this point. There was, however, one argument raised against the present rule, namely, that at all events it was now too late to make this objection to the service of the notice, and against that argument the case of *The King* v. *Nicholls* was cited. On the authority of that case, (without deciding that in *all* cases such a motion may be made after *any* lapse of time,) I think that this motion was not too late. In that case a rule *nisi* for a *certiorari* was obtained in *Hilary* Term, no notice having been given to the justices before obtaining the rule. The rule was obtained on the 3d *February*, was argued and made absolute on the 10th, no cause being shewn; so that more than six days elapsed between the time of moving for the rule and making it absolute. In *Easter* Term following a motion was made to quash the *certiorari*, but the Court said that the practice had been to give the notice before moving for the rule *nisi*. Now though it does not appear from the report of the case, that the objection of the motion having been too late was made, yet it is clear that it must have been, and the Court said that the rule *nisi* was not notice to the justices, and then quashed the *certiorari*. That case, therefore, is directly in point, and this rule must be made absolute. There was also another argument raised, namely, that it

was not competent to the respondents in the appeal to object to the sufficiency of the notice to the justices; but I cannot tell but that they (the justices) may be injured, and may have wished to support their own order.

Rule absolute.

CARTER'S Bail.

BUSBY opposed these bail, and objected that the affidavit of justification stated they were "possessed" of certain property, which was not in conformity to the rule of *T.* T. 1 *Will.* 4, 3 (*a*). He objected, that as the defendant had elected to proceed under that rule, and the affidavit was bad, that the bail could not now be allowed to justify at all, and cited *Penson's* bail (*b*).

Bail allowed to justify although the affidavit of justification did not conform with the form given in the rule of *H.* T. 1 *W.* 4.

Knowles, contrà, admitted the irregularity of the affidavit, but contended that the only consequence was, that the defendant would not be entitled to the costs of justifying if the bail were allowed.

WILLIAMS, J.—I have no doubt but that the bail may justify (*c*).

The bail were then examined and allowed.

(*a*) 1 Dowl. P. C. 103.
(*b*) 1 Har. & Wol. 663; 4 Dowl. P. C. 627.
(*c*) But see *Anon.* 1 Dowl. P. C. 160, and *Cripp's* bail, *post*, *T.* T. 1837.

DOE *d.* LAW *v.* ROE.

SMIRKE moved for judgment against the casual ejector. The action was brought for a forfeiture by non-payment of rent due at *Christmas* last. The premises sought to be recovered was a house in *Great Ormond Street*, which was shut up, and the shutters closed, so that it was impossible to ascertain whether there was furniture inside, or any sufficient distress for the rent. The premises had been watched ever since *Christmas*, and the tenant could never be met with, nor was it known where he was. The declaration had been stuck up on the outside of the house, and it was submitted, that as it could not be sworn positively that the house was empty, so as to proceed as on a vacant possession (*d*), that this rule might be granted.

In ejectment, where the tenant could not be found, and it could not be ascertained whether the premises were legally vacant, service of the declaration, by sticking it on the premises, was held sufficient for a rule *nisi* for judgment.

WILLIAMS, J.—You may take a rule *nisi*, to be served in the same way as the declaration was.

Rule *nisi* granted (*e*).

(*d*) *Savage* v. *Dent*, 2 Strange, 1064.
(*e*) See the case of *Doe* d. *Smith* v. *Roe*, *ante*, 69.

Bail Court.

EDMONDS *v.* FLETCHER.

An interpleader rule was granted in *Hilary* Term, but not decided until *Easter* Term, when the execution creditor consented to abandon his execution: the Court refused to compel him to pay the costs of the rule, because he had not abandoned the execution sooner.

W. H. *WATSON*, on the 20th of *April*, appeared for the execution creditor on a rule obtained by *Bere* last term for the sheriff of *Hampshire*, under the Interpleader Act, 1 & 2 *Will.* 4, c. 58, s. 6; and on account of what appeared on the affidavits, consented to abandon his execution.

Wordsworth, for the claimant, asked for costs, submitting that it appeared from the affidavits that the execution creditor ought long ago to have discovered that the property seized belonged to the claimant, and to have therefore abandoned his execution.

WILLIAMS, J.—I do not think that that is any ground at all for granting costs. The abandonment of the execution now is as early as can be required.

Rule accordingly.

WHATMORE *v.* NICHOLS.

A note in the margin of a general demurrer, setting out various causes of demurrer in the manner of a special demurrer, held sufficiently to comply with rule 2 *H.* T. 4 *Will.* 4.

THIS was an application to set aside a demurrer, on the ground that the note in the margin did not comply with rule 2 *H.* T. 4 *Will.* 4 (*a*). The demurrer was a general demurrer to a declaration in an action for a libel. In the margin it was stated, "The causes of demurrer are, &c." setting out various causes, somewhat in the way that causes of special demurrer are stated in the body of a demurrer. It was not stated that the defendant intended to reply on either of them in argument.

E. Perry.—The case of *Lindus* v. *Pound* (*b*) is a case in support of this application.—[*Williams*, J.—That case only decides that the rule of Court applies to special as well as to general demurrers. The only argument that I there find urged is, that the rule does not apply to special demurrers.]—In this case there is no matter of law stated which it is intended should be urged. If a party is to be allowed thus to state the causes of demurrer in this case, he would be allowed to state them in the same way in the margin to a special demurrer, and so would deprive parties of the benefit of the rule of Court.

WILLIAMS, J.—What is stated amounts merely to this, that the party has stated too much. I do not see how I am to say this is a nullity, because the party has not pointed out on which of these several matters he relies. The utmost that can be said is, that he has done more than is required.

Rule refused.

(*a*) 2 Dowl. P. C. 304.

(*b*) 1 Mur. & Hurl. 27; 2 Mees. & Wels. 240; 5 Dowl. P. C. 459.

KIDD *v.* DAVIS.

A RULE *nisi* was granted last term to set aside the notice of a declaration. An affidavit in opposition to the rule was sworn and filed, a few days previous to the present term, stating that the affidavit on which the rule *nisi* was obtained, was sworn before a commissioner "who *is* the attorney for the said defendant in the cause." No appearance had been entered by the defendant.

1. An affidavit sworn before the attorney of a party, but who was not attorney *on the record*, held bad.

2. It must appear clearly by affidavit, on such an objection being made, that the attorney was attorney for the party *at the time* the affidavit was sworn.

F. V. Lee, on shewing cause, took a preliminary objection, that this was contrary to the rule of Court *H.* T. 2 *Will.* 4, I. 6 (*a*), and submitted, that although that rule in its terms at first mentioned the attorney *on the record*, yet, that taking the whole rule together, it meant the attorney *for the party*, and that the constant practice was so to construe it.

Mansel, contrà, submitted that the rule was confined to the attorney *on the record*, and that here there was no attorney on the record, no appearance having yet been entered for the defendant.

WILLIAMS, J.—I think, Mr. *Mansel*, that this case is within the meaning of the rule (*b*).

Mansel then submitted that the case of *Beaumont* v. *Dean* (*c*) shewed that it must expressly appear on the affidavit in opposition, that the person was attorney for the party, and that in this case it did not distinctly appear, inasmuch as the affidavit only stated that the commissioner was *then* attorney for the defendant, and that it could not be presumed he was attorney for the defendant two months previously, when the rule *nisi* was granted.

F. V. Lee submitted that it must be assumed he was attorney for the defendant in the cause from its commencement.

WILLIAMS, J.—I think it ought to be made to appear clearly on the affidavit on the part of the plaintiff, as it is his objection, that the commissioner was attorney for the defendant at the time the affidavit was sworn.

The rule was afterwards, by consent, made absolute without costs.

(*a*) 1 Dowl. P. C. 184.
(*b*) See the cases of *Doe* d. *Grant* v. *Roe*, *ante*, 68; 5 Dowl. P. C. 409.
(*c*) 4 Dowl. P. C. 354.

SHEARMAN *v.* MACKNIGHT.

THIS was a rule *nisi* to discharge the defendant out of custody of the sheriff of *Sussex*, on entering a common appearance. By the affidavits on which the rule *nisi* was granted, it appeared that the defendant was arrested at nine o'clock in the morning on the 3rd of *April*, and was taken to a lock-up house, and that no copy of the *capias* was delivered to her until seven o'clock the same evening. The affidavits in opposition were contradictory, and stated the delivery of a copy immediately on the arrest being made.

1. On making an arrest, a copy of the *capias* must immediately be delivered to the defendant.

2. If it is not, the Court will discharge the defendant on motion.

Bail Court.

SHEARMAN v. MACKNIGHT.

Butt shewed cause.—This rule was granted on the ground that the sheriff's officer, when he made the arrest, did not comply with the provisions of the Uniformity of Process Act, 2 & 3 *Will.* 4, c. 39, s. 4, as he did not deliver a copy of the *capias* to the defendant "forthwith" on the arrest being made. But it is submitted, that even if the affidavits in opposition do not prove that a copy was delivered immediately on the arrest being made, yet this delivery at seven o'clock in the evening is a sufficient compliance with the terms of the act. The act says, that the person making the arrest "shall, upon or forthwith after the execution of such process, cause one such copy to be delivered to every person upon whom such process shall be executed." That enactment means that the copy shall be delivered *within a reasonable time* after the arrest, and in this case it must be considered to have been done within such reasonable time. Supposing however that there has been an irregularity, still that is the act of the sheriff, for which the plaintiff ought not to be deprived of his security of bail. The defendant ought to have moved for an attachment against the sheriff instead of the present rule.—[*Williams*, J.—Is not the sheriff the agent of the plaintiff in making the arrest, and has not the plaintiff his remedy over against the sheriff if he suffers from the sheriff's irregularity?]—There is nothing in the act to make the process void if these provisions are not complied with; those provisions are directory only, and if not complied with, will not have the effect of making the arrest bad. In *Pocock* v. *Mason* (*a*), the Court of *Common Pleas* refused to discharge a defendant for trifling defects in the process. The present is a similar case.

Martin, contrà.—The Court has already answered the objection that the defendant's remedy is against the sheriff, by the observation that the latter is the plaintiff's agent in making the arrest. The uniform practice has been to discharge a defendant for any irregularity in making the arrest (*b*). It is clear that this delivery of the copy of the *capias* so many hours after the arrest was made, cannot possibly be a delivery *forthwith* after the arrest. The act intends that the arrest and the delivery of the *capias* should be contemporaneous acts. In the form of the writ given in the schedule to the act, the word "forthwith" is omitted, which shows still more the intention of the legislature. The object of the legislature was, that a defendant on his arrest should immediately have information of what he must do to procure his freedom, which information the copy of the *capias* gives him.

WILLIAMS, J.—The first question is, whether or not I am satisfied that a copy of the *capias* was delivered to the defendant at the time of the arrest, or within such a time afterwards as will come within the description of the term "forthwith," and I think that on these affidavits it appears that there was not any copy so delivered. The next question is, how I am bound to interpret the term "forthwith" in this act of parliament. I think that no one can doubt, on reading the act, that all the forms prescribed are intended to be for the benefit of the party arrested, and therefore it is incumbent on those executing the process, to comply with the precise directions of the act, which cannot be more express. The act directs that the person making the arrest "shall upon or forthwith after the execution of such process, cause

(*a*) 1 Scott, 51.
(*b*) See *Hodgson* v. *Towning*, *ante*, 53; 5 Dowl. P. C. 410.

one such copy to be delivered to every person upon whom such process shall be executed." That seems to be an injunction which it is intended should be imperative, and I am bound to suppose that there was some good reason for the enactment. That reason is apparent; it is, that the copy is intended to be left, so that the party may immediately set himself in motion to find bail and procure his liberty. As therefore the statute prescribes that a copy of the *capias* should be *forthwith* delivered, I am bound to give that construction to it which will have the greatest effect for the ease and favour of the party arrested. The statute not having been complied with, this rule must be made absolute, on the terms of no action being brought.

Rule absolute accordingly.

POYNDER *v.* BLUCK.

An expression in writing, that if a debt was not paid, it was very fit it should be, with other slight expressions, having been left to a jury to say whether it was an acknowledgment of the debt, so as to take the case out of the statute of limitations, and the jury having found that it was, the Court granted a new trial.

THIS was an action for the value of lead supplied to the defendant. At the trial in the Sheriff's Court in *London*, before Mr. Serjeant *Arabin*, the material question was, whether there had been a sufficient acknowledgment in writing to take the case out of the statute of limitations. Several letters of the defendant were relied on for this purpose; the first was his answer to the application for payment by the plaintiff's attorney, in which he said he had no doubt but that he had paid the account, and that he would look for the receipt. In a subsequent letter, in answer to a further application, he said that the repairs of a house, for which the lead was wanted, had been done under the direction of a Mr. *Davis*; that he would inquire for him and write to him; that to the best of his recollection *Davis* bought the goods, and he had no doubt had paid the account; and that if by chance it was not paid, it was very fit it should be. At the trial Mr. Serjeant *Arabin* said he thought that this was some evidence, though slight, to go to the jury, to take the case out of the statute. He then left it to the jury with a caution, and the jury found a verdict for the plaintiff for 3*l.* 2*s.* A rule *nisi* for a new trial having been obtained,

Platt shewed cause.—In this case there was *some* evidence to go to the jury of a written acknowledgment, and therefore it was a matter entirely for the jury to decide on.

Ryland, contrà.—It is a question of law merely whether this was an acknowledgment of the debt, and it ought never to have been left to the jury. In the case of *Knott* v. *Farren* (*a*), there was a stronger acknowledgment, yet the Court held that the jury were warranted in negativing it.—[*Williams*, J. —But in that case, as well as in the case of *Lloyd* v. *Maund* (*b*), the Court decided that it was a question for the jury to determine.]—*Hellings* v. *Shaw* (*c*) is a stronger case for the defendant, and is an authority to shew that evidence as slight as was given in this case, ought not to be left to the jury. In *Snooke* v. *Mears* (*d*) a stronger admission than the present was held to be a question for the Court and not for the jury to determine. *Whippy* v. *Hillary* (*e*) is to

(*a*) 4 Dow. & Ryl. 179.
(*b*) 2 Term Rep. 760.
(*c*) 2 Taunt. 608; 1 Moore, 340.
(*d*) 5 Price, 636.
(*e*) 3 Barn. & Adol. 399; 5 Car. & P. 209.

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PETTMAN v. BLUCK.

the same effect. *Birk* v. *Gye* (*a*) and *Brydges* v. *Plumptree* (*b*), decide, that the defendant having stated that he had the receipt, is not an acknowledgment.

WILLIAMS, J.—It appears from the note of Mr. Serjeant *Arabin*, that he doubted whether there was sufficient evidence for the jury; and the question now is, whether there was sufficient evidence to sustain the verdict. As to any actual promise to pay, there is no pretence for it, nor is it indeed contended that there was. The expression, "I will see *Davis* or write to him—I have no doubt he has paid it—if by chance he has not paid it, it is very fit it should be," is by no means an unconditional promise. Then comes the other question, whether sufficient appears on the letters to shew that the debt is still unpaid, from which the law will imply a promise to pay, and to that there seems to me the same answer. The first letter says that the debt has been paid, and the other letter is rather an assertion that it has been paid by some one else. There is no intimation by the defendant that he thinks the debt still due. The reported cases certainly run very near each other; but it is also certain, that the later cases shew that it now requires stronger evidence to take a case out of the statute. It was formerly held, that a slight acknowledgment was sufficient, as "what an extravagant bill you have delivered me" (*c*). So also where a defendant said he was protected by the statute (*d*). The later cases, however, do not go to that extent, and I think here that there was no acknowledgment that the debt was in existence, and still less that there was any promise to pay it. The rule must therefore be made absolute for a new trial, on payment of costs.

Rule absolute accordingly.

(*a*) 4 Esp. 184.
(*b*) 9 Dow. & Ryl. 746.
(*c*) *Lawrence* v. *Worrall*, Peake, 93.
(*d*) *Coltman* v. *Marsh*, 3 Taunt. 380; *Bryan* v. *Horseman*, 4 East, 599; 1 Smith, 125; 5 Esp. 81; *Rowcroft* v. *Lomas*, 4 Mau. & Selw. 457; *Leaper* v. *Tatton*, 16 East, 420.

CROSLEY *v.* INNES.

1. On a rule to stay proceedings on a bail-bond, bail above having been put in, it is not necessary that it should appear on the affidavit that there was a rule for the allowance of bail.
2. The affidavit of merits made by the defendant, stating he had a good defence on the merits, "as he was advised and believed," is good.
3. The Court will not order the bail-bond to stand as a security, if a trial has not been lost at the time the rule *nisi* was moved.

A RULE was obtained on the 21st of *April* to shew cause why the proceedings on a bail-bond should not be stayed on payment of costs, bail above having been put in and justified. The affidavit of the defendant, on which it was obtained, swore that bail above had been put in and justified, but did not state that there had been any rule for the allowance of bail. It also stated that he had a good defence to the action on the merits, "*as he was advised and believed.*" The declaration had been filed conditionally on the 7th of *April*, and notice given of it on the 8th. The defendant lived more than forty miles from *London*.

Mansel shewed cause on *Friday* the 28th of *April*.—It is not sworn sufficiently positively that the defendant has a good defence on the merits. The affidavit being made by the defendant himself and not by his attorney, he should swear positively that he has a good defence on the merits, and not that he is advised and believes. The case of *Roe* v. *The Sheriff of Middlesex* (*e*) is

(*e*) 1 Dowl. P. C. 398.

an express decision of *Taunton*, J. that the affidavit must be positive. The cases of *Tate* v. *Botfield* (*a*) and *Lane* v. *Isaacs* (*b*), also shew how necessary it is to have such affidavits. *Worthington* v. —— (*c*) is an almost parallel case to the present, and there it was held that the affidavit was insufficient. It would be impossible to assign perjury on this affidavit. Another objection is, that the affidavit should state that there was a rule for the allowance of bail. *The King* v. *The Sheriff of Middlesex* (*d*) shews that it is necessary there should be such a rule; and it is submitted, therefore, that it ought to appear on this affidavit that such a rule was drawn up and served; *Ellis* v. *Bates* (*e*). Should the Court make this rule absolute, the plaintiff is entitled to have the bail-bond stand as a security, as a trial has been lost (*f*). The defendant would have been entitled to eight days to plead after the 8th of *April*, which would allow fourteen days' notice of trial to be given for the last sittings in this term, which are on the 6th of *May*.

Henderson, contrà, was stopped as to the two objections to the affidavit.—As to the bail-bond standing as a security, the case of *Stride* v. *Hill* (*g*) shews that it is necessary the trial should have been lost at the time this rule was moved for. Now here, the eight days to plead expired on the 16th, and the fourteen days time to give notice of trial would not expire until the 30th, a day which has not even now arrived. No trial can therefore have been lost at the time this rule *nisi* was granted.

WILLIAMS, J.—As to the point on the affidavit, I do not see how the merits could be stated in any other manner. It is sworn that he has a good defence on the merits, as he is advised and believes. If a person knows only the facts of his defence, and does not know the law as applicable to them, how can he swear more positively on a mixed case of fact and law? He must take advice of some one, and I do not see what more he could state. If he were to swear positively, it would, in fact, be saying, if I am rightly advised as to the law, such facts make a good defence. As to the other point on the affidavit, it appears on the affidavit that the bail has justified, and I must presume that every thing previous was rightly done. It appears that the plaintiff had not lost a trial at the time this rule was moved for, and therefore the rule must be made absolute on the terms of the defendant pleading issuably on *Monday* next, and taking short notice of trial.

Rule absolute accordingly.

(*a*) 3 Dowl. P. C. 218.
(*b*) 3 Dowl. P. C. 652.
(*c*) 2 Cr. Mees. & Ros. 315.
(*d*) 2 Dowl. P. C. 116.
(*e*) 2 Cromp. & Mees. 143; 4 Tyr. 64.
(*f*) Reg. Gen. *H.* T. 2 *W.* 4, V.; 1 Dowl. P. C. 199.
(*g*) 1 Gale, 431; 4 Dowl. P. C. 709.

Ex parte FOWKE.

BUTT applied to the Court that the time for the admission of Mr. *Fowke*, as an attorney of this Court, might be extended until *Michaelmas* term

A person who has obtained an extension of his time for admission as an attorney, on the ground of ill health, may be allowed a further extension, if his illness has put him to such expenses that he is unable to pay for his admission.

Bail Court.
Ex parte FOWKE.

next. He had regularly passed his examination and received his certificate, but in *Michaelmas* term last (*Nov.* 24th) had applied to the Court for an extension of the time for his admission until the present term, on the ground of ill health (*a*). That application was granted, and it was now necessary he should apply for a further extension, as he was unable to pay for his admission owing to the expenses he had been put to during his illness. He had in consequence just entered into an engagement to serve in an attorney's office for six months from the 1st of *May*, and when that time was expired, he hoped to be able to have sufficient to pay for his admission. It was submitted that every thing having been regularly done, the Court would grant this application, and not put Mr. *Fowke* to the expense and inconvenience of a fresh examination.

WILLIAMS J.—I think, under the circumstances, the application may be granted.

Ordered accordingly.

(*a*) See the rule *H.* T. 6 *W.* 4. 1; 1 Har. & Wol. 638.

Ex parte NASH.

A person may be examined as an attorney, where, through the fault of his master, his articles of clerkship have not been properly enrolled.

BUTT applied on the 28th of *April* for an order of the Court to allow the examination of Mr. *Nash* on the 1st of *May*, for the purpose of being admitted as an attorney. The proper notices had been given for his examination and admission this term, but the day before (*April* 27), Mr. *Nash* had received a notice from the examiners that he could not be examined, as his articles of clerkship had not been properly enrolled. Mr. *Nash* stated that the non-enrolment of his articles was entirely the fault of a person to whom they had been assigned, and not at all of Mr. *Nash* himself. If the present application were not granted, Mr. *Nash* would be delayed until *Michaelmas* term next before he could be admitted.

WILLIAMS, J. granted the application.

Platt, on the last day of the term, asked leave for Mr. *Nash* to be allowed then to give notice for his admission next term. Since the above order for his examination had been obtained, he had been examined and had obtained his certificate of examination, but he could not be admitted as an attorney, as the articles of clerkship had not been enrolled. That enrolment could now only be made under the usual annual indemnity act, which it was expected would be passed within a few days. If this application were refused, it would be necessary for Mr. *Nash* to wait until *Michaelmas* term next before he could be admitted.

WILLIAMS, J. granted the application.

Ordered accordingly (*a*).

(*a*) See *Ex parte Abrahams* and *Ex parte Bates*, *post*, T. T. 1837.

FACER *v.* FRENCH and another.

A plaintiff suing in *formâ pauperis*, who gave notice of trial, was dispaupered for withdrawing the record, though advised by counsel that it was necessary to amend the pleadings.

THE plaintiff in this case, which was an action of trespass, sued as a pauper. Notice of trial was given for the last assizes for the county of *Hertford*, and the cause was entered for trial, but on the second day the record was withdrawn. It appeared by affidavit on the part of the plaintiff, that after he arrived at *Hertford* he consulted with counsel, who said he could not safely go to trial without amending the pleadings, on which account it was that the record was withdrawn. It did not appear what the nature of the amendment required was. A rule having been obtained to shew cause why the plaintiff should not be dispaupered, on the ground that he had put the defendant to expense by giving notice of trial, which he did not countermand,

C. C. Jones shewed cause, and contended, that under these circumstances there was not such misconduct on the part of the plaintiff as would induce the Court to dispauper him.

Chilton, contrà, was stopped by the Court.

WILLIAMS, J.—The plaintiff might have made application to the judge at the assizes to amend the record, and then the judge would have made such order as he thought fit as to the costs; but by taking the parties all down to the assizes, and then withdrawing the record, he has put the defendant to a great expense. The rule must be made absolute.

Rule absolute (*a*).

(*a*) See Reg. Gen. *H.* T. 2 *W.* 4, I. 110; 1 Dowl. P. C. 198.

DOE dem. HUNTER *v.* ROE.

The declaration in ejectment was served on a person who denied that he was the tenant, but from the description of his person a neighbour said he had no doubt he was the tenant:—*Held* a good service.

DAVISON moved for judgment against the casual ejector. The affidavit stated that the deponent went to the premises sought to be recovered to serve the tenant in possession, *William Henry Cooper*, and asked for Mr. *Cooper*, when a person answered that he was Mr. *Cooper*. The deponent then gave him a copy of the declaration and the notice, when he said that his name was *William Cooper*, and that he took care of the house for *William Henry Cooper*, who was from home. The deponent then inquired of a person next door, who said he had no doubt that, from the description, the person the deponent saw was the tenant in possession himself.

WILLIAMS, J. granted the rule.

Rule absolute.

Bail Court.

SPENCELEY *v.* SHOALS.

A summons for leave to plead several matters, served before, but returnable after the time to plead expires, and at the same hour when the judgment office opens, acts as a stay of proceedings, so that the plaintiff cannot sign judgment as for want of a plea.

ON the 10th of *February* last the defendant had an order for further time to plead, which expired on the 17th. On the 17th he took out a summons for leave to plead several matters, returnable before a judge at chambers the next day at eleven o'clock. This summons was served before nine o'clock on the evening of the 17th. The next morning, when the judgment office opened at eleven o'clock, the plaintiff signed judgment as for want of a plea. A rule having been obtained to shew cause why this judgment should not be set aside for irregularity,

Butt shewed cause.—The defendant's further time to plead having expired on the 17th, he was bound to plead on that day. Not having done so, the plaintiff was at liberty to sign this judgment the next morning, when the office opened. The summons to plead several matters having been taken out and served, does not act as a stay of proceedings, being returnable after the time for pleading had expired. The mere taking out the summons is not sufficient. The case of *Wells* v. *Secret* (a) differs from the present, as in that case there had been no order for further time to plead. The cases of *Byles* v. *Walter* (b) and *Bebb* v. *Wales* (c), where a summons was held to be a stay of proceedings, also differ materially from this case. In those cases the summons was for further time to plead, and the point argued was, the irregularity of the time at which the summons was made returnable.

Alfred S. Dowling, contrà, was stopped by the Court.

WILLIAMS, J.—I think that the case of *Wells* v. *Secret* is in point. The pressure of the argument seems to me to be, that the plaintiff could not, on the day relied on, namely, the 17th, take advantage, in the only office where advantage could be taken, of the defendant's default in not pleading. The defendant then took out a summons returnable at the same time that the office opened, at which the plaintiff could take advantage of the defendant's default. But that summons acts as a saving of the defendant's default, and I think the plaintiff had no right to sign the judgment until the summons was disposed of.

Rule absolute.

(a) 2 Dowl. P. C. 447.
(b) 2 Har. & Woll. M. T. 1836; 5 Dowl. P. C. 232.
(c) 5 Dowl. P. C. 458.

Ex parte PETERSON.

[illegible]

SIR F. POLLOCK applied for an order to the examiners to examine a person for his admission as an attorney, they having refused to examine him, as they doubted whether he had properly served under his articles. He had served regularly except the three last months of his time, during which time he was absent by his master's permission, but was engaged studying law and attending the Courts in *London*. After his time expired he served his master for eight months additional. The master, in his an-

Ex parte PETERSON.

swers to the questions put by the examiners, had stated this absence, and that it was with his consent (*a*). It was submitted, that the more correct course for the examiners would have been to examine the party first, and then to have made him apply to the Court before he was admitted. The case of *Ex parte Hubbard* (*b*) was cited.

WILLIAMS, J.—You may take an order. Order made.

(*a*) See these questions 2 Har. & Wol. 3.

(*b*) 1 Dowl. P. C. 438; and see also *Ex parte Frost*, 1 Har. & Wol. 111.

In re HARDWICK.

The Court will not grant a *habeas corpus* to bring up the body of a person in prison under sentence for a felony, for the purpose of having him tried for a previous felony.

SHEE applied for a *habeas corpus* to the gaoler of *Plymouth*, to bring up the body of *Hardwick*, for the purpose of being committed to the gaol at *Brecon*. Some years since *Hardwick* had been committed to the gaol at *Brecon* to take his trial for a felony committed in that county, and he afterwards escaped. He had since been convicted of another felony, was sentenced to seven years transportation, and was now in prison under that sentence in the gaol at *Plymouth*. The present application was made on the part of the prosecutor for the first felony, for which it was desired to try *Hardwick*. It was submitted that the first felony might perhaps be a capital one; and that at any rate it was fit he should be tried for it.

WILLIAMS, J.—I think I cannot interfere, as the party is in prison under his conviction.

Rule refused.

ROXBURG *v.* CRESWELL.

Where a defendant obtained the order of a judge for his discharge out of custody, on account of being supersedable, and the order was incorrect, and instead of applying to have it amended, did nothing for six months, when he applied for a rule absolute for his immediate discharge under the rule *H.* T. 2 *W.* 4, I. 88, the Court refused the application.

UDALL moved for a rule to discharge the defendant out of the custody of the Warden of the *Fleet*, under the rule of Court *H.* T. 2 *W.* 4, I. 88 (*c*). —The defendant had surrendered in discharge of his bail, and in *October* last had obtained an order of *Gaselee*, J., for his discharge, on the ground that he was supersedable, because the plaintiff had not declared in due time. This order the Warden refused to obey, as it did not agree with the commitment, the defendant's name in the order being spelt *Cresswell* instead of *Creswell*. No steps had been since taken to rectify the order, as the defendant was afterwards detained at the suit of several other persons. A declaration had this term been delivered, and the time for pleading expired on this day (*May* 2d). It is submitted, that if the defendant pleads, or takes out a summons for further time to plead, it will be a waiver of the irregularity, so as to prevent the defendant applying for a supersedeas. In the case of *Pearson* v. *Rawlings* (*d*) it was held, that by pleading, the irregularity was waived. The same rule is laid down also in Mr. *Tidd's Practice*. It had therefore become necessary to apply for the defendant's *immediate* discharge under the rule 88 *H.* T. 2 *W.* 4.—[*Williams*, J.—You may take a rule *nisi*.]—

(*c*) 1 Dowl. P. C. 195.

(*d*) 1 East, 77.

Bail Court.

ROXBURG v. CRESWELL.

It is submitted, that the rule may be absolute in the first instance, and unless it is so, it will be of no use to the defendant, as he must plead to-day. The rule of Court is, that the defendant should be *forthwith* discharged, and the Warden ought in fact to have discharged him without requiring the order of the Court. The Warden has given his certificate that there was no special matter by which the defendant was not entitled to his discharge, as mentioned in the rule of *H.* T. 2 *W.* 4, I. 87 (*a*).—[*Williams*, J.—Why has the defendant laid by so long without having the order of my brother *Gaselee* corrected?]—Because it was of no consequence, he having been afterwards detained at the suit of several other persons. He has also been obliged to change his attorney.

WILLIAMS, J.—This is quite a new application, and the party has brought the present state of things on himself by his delay. He had better apply again by summons before a judge at chambers to get discharged. I shall not interfere in the case, but application may be made to the full Court, as it is a novel application.

Udall then asked for a rule *nisi* for a supersedeas, with a stay of proceedings in the meantime, but was refused, and then took a rule *nisi* for a supersedeas singly.

(*a*) 1 Dowl. P. C. 194.

POWELL *v.* DUNCAN.

On making a rule absolute, no cause being shewn, for the defendant to plead a plea *puis darrein continuance*, the matter whereof had arisen more than eight days previously, the Court refused to insert in the rule that the plea might be pleaded without the usual affidavit.

THE plaintiff in this case was a woman, and had passed at different times under different names. The action was case for darkening ancient windows, the general issue was pleaded, and notice of trial had been given for the sittings after *Hilary* term. The cause however had not been tried. About a week previous to this application being made, rumours had reached the defendant that the plaintiff had lately been married. Inquiry was accordingly made, and after considerable search it was discovered on the 9th *April* that the plaintiff was married at *St. Martin's in the Fields*, under the name of *Ann Bush*, on the 3d of *April*. A rule was obtained on the 22d of *April* to shew cause why the defendant should not be at liberty to plead the coverture of the plaintiff *puis darrein continuance*. It was necessary to obtain this rule, as by the rule of Court (*b*), it was directed that the plea should be pleaded within eight days after the matter thereof arose.

Thesiger moved, on the 3d of *May*, to make the rule absolute, no cause being shewn; and asked the Court to order that the plea might be pleaded without the usual affidavit that the matter thereof arose within eight days previous (*b*).

WILLIAMS, J.—I cannot introduce those terms into the rule now, they ought to have been introduced in the first instance; had they been so intro-

(*b*) Rule 2, *H.* T. 4 *W.* 4; 2 Dowl. P. C. 313.

duced, the plaintiff might perhaps have shewn cause against the rule. The rule must be made absolute in its present terms, and, if necessary, a summons must be taken out to get the terms now asked for introduced.

Rule absolute.

DALTON *v.* TUCKER.

BERE moved for an attachment for non-payment of costs, pursuant to a rule of Court and the Master's *allocatur*, on an affidavit stating that the original rule and *allocatur* had been shewn to the party, but not stating that a copy of the rule had been left with him. He submitted that it was sufficient to shew that the party had knowledge of the rule, which was in this case done, and that it was not therefore necessary that a copy should be left.

On moving for an attachment for non-payment of costs, pursuant to a rule of Court, it must be sworn that a copy of the rule was left with the party, and it is not sufficient to shew that he had knowledge of the rule.

WILLIAMS, J.—That is not sufficient, a copy must be left with him.

Rule refused.

STORY *v.* HODSON.

THIS was an action for money lent &c., to which the defendant pleaded the Statute of Limitations and a set-off. The cause was tried before the under-sheriff of *Cumberland*, and a verdict found for the plaintiff for 1*l.* 13*s.* 9*d.*. A rule having been obtained to shew cause why the plaintiff should not be deprived of his costs, the verdict being under 40*s.*;

The Court has no general power over the costs of a cause, so as to deprive a plaintiff of his costs, because the verdict is under 40*s.*, even in a cause tried before the under-sheriff.

W. H. Watson, shewed cause.—The Court has no power to grant this rule. The only power to make such a rule at all is under the stat. 43 *Eliz.* c. 6, but by that act the power is given to the *judge who tries the cause*, and this cause has been tried before the under-sheriff, under the provisions of the stat. 3 & 4 *Will.* 4, c. 42, s. 17. If the Court has this power, independent of the statute of *Elizabeth*, it would have been unnecessary to make so many applications to the Court under the authority of that act. The cases of *Wardroper* v. *Richardson* (*a*), and *Claridge* v. *Smith* (*b*), shew that the Court has not the general power to grant this rule, as in those cases the application would have been made to that general power. The necessity for the enactment of the statute of *Elizabeth* is itself an argument to shew that the Court has not this general power.

Armstrong, contrà.—There is no doubt but that the under-sheriff has no power to grant a certificate under the statute of *Elizabeth*. Still it is submitted that the Court has power to make this rule absolute; as it has a general power over all causes which are prosecuted in it, so it has consequently power over the costs of those causes.

Cur. adv. vult.

(*a*) 1 Adol. & El. 75; 3 Nev. & Man. 839.
(*b*) 1 Har. & Wol. 667; 4 Dowl. P. C. 583; see also *Wills* v. *Langridge*, 2 Har. & Wol. *M.* T. 1836.

Bail Court.

STORY v. HODSON.

WILLIAMS, J. afterwards (*May* 8th) gave judgment.—This was an application to take away from the plaintiff his costs, on the ground that on the trial a sum under 40*s.* had been recovered. This application is made on the assumption, and it seems to me that it is a clear assumption, that the sheriff has no power to certify to deprive the plaintiff of his right to costs. Whether that is a defect in the act of parliament giving the writ of trial it is not for me to say. It is said that there was a clause giving the power in the original bill, which was struck out in its passage through parliament. However, there is no doubt that the sheriff has not the power, and it is also clear that a certificate under the statute of *Elizabeth* to deprive the plaintiff of his costs, is a certificate which is not to be given by *the Court* but by *the judge who tries the cause.* This application, therefore, is to the general superintending power of the Court over the cause, and consequently over the costs, as the sheriff who tried the cause has no power to grant the certificate. I was not furnished during the argument with any decision, nor am I aware of there being any, to shew that the Court has authority by its own power, (nor is there any provision by statute to give the power,) where the proceedings are before the sheriff, to deprive a party of his costs, merely on the supposition that the Court does not approve of the proceedings. The ground and foundation therefore of this rule fails, and the rule must consequently be discharged, but without costs.

Rule discharged, without costs.

RIGBY and others *v.* WALTHEW.

It was agreed by deed that every member of a building society should pay a fixed sum monthly as long as he continued a member. All these subscriptions and fines, &c. were to be considered joint property. A person signed the deed as a member, having a share given him for his remuneration as secretary, but it was afterwards agreed by parol that he should cease to be a member, and should have a fixed salary instead:—*Held*, that he was not a competent witness to prove the breaches of a bond given by a member, by non-payment of his subscription and of certain fines.

A release, reciting that he had ceased to be a member, releasing his demands on the funds, and executed by himself alone, does not make him a competent witness.

THIS was an action brought by the surviving trustees of the *Liverpool Building Society*, on a bond given by a surety for *Ford*, one of the members of the society. By deed dated in *December*, 1825, and signed by the trustees and by every member of the society, it was agreed that the parties should be associated together until every member had received the sum of 120*l.*; each member was to pay the sum of 12*s.* every four weeks as long as he was a member, and there were certain fines specified for non-payment. Every member was to receive his share of 120*l.* under particular regulations. By one provision (the 13th) it was agreed that all fines, subscriptions, redemptions, and premiums paid by the members, were to be considered joint property, and were to go to the augmentation of the general fund. There was also a provision that any member might retire from the society on certain terms specified. This action was brought to recover the 12*s.* monthly subscription, which had been left unpaid by *Ford* for some time, as well as a large sum that was due for fines. The defendant suffered judgment by default, and on the writ of inquiry before the under-sheriff of *Lancashire*, to assess the damages on the breaches suggested, *Mercer* was called as a witness for the plaintiffs. He was examined on the *voire dire*, when he said that he had signed the original deed as a member; that he had the share given him in lieu of a salary as secretary; that in 1834, he found his share not sufficient remuneration for his services, and it was then agreed,

at a meeting of the committee, that he should have in future a salary of 12*l.* a-year, that he should cease to be a member, and that his share should be cancelled, and that he had accordingly received that salary since. It was then objected on the part of the defendant, that *Mercer* was an incompetent witness, and the under-sheriff decided that he was. A release was then executed by *Mercer* alone, which recited that the share of *Mercer* was cancelled upon the agreement to have the salary of 12*l.* a-year, and he then released all claims and demands which he had, or thereafter might have, on the funds for his salary. It was then objected that this release was not sufficient to make *Mercer* a competent witness, and the under-sheriff being of that opinion, and there being no other evidence to prove the breaches suggested, a verdict was found for merely nominal damages. A rule to shew cause why the inquisition should not be set aside and a new one granted, on the ground that *Mercer* was improperly rejected as a witness by the under-sheriff, and also on affidavits;

Crompton, shewed cause.—The under-sheriff was right in refusing *Mercer* as a witness, both on account of his original incompetency on the ground of interest, and because the release executed was not sufficient to make him competent. The effect of *Mercer's* evidence was to increase the funds of the society, and it appears, that by the deed which he himself had signed, each member was to pay 12*s.* monthly, and that that was to continue until every member had received 120*l.* out of the funds of the society. By another provision, it was agreed that all subscriptions and fines were to be considered joint property, and were to go to the augmentation of the general fund. The effect, therefore, of *Mercer's* evidence being to increase the sum recovered by the verdict, which sum would go to the augmentation of the general fund, shews that he was directly interested, as he had a joint property in that fund, and was liable to pay his 12*s.* monthly until that fund had paid 120*l.* to every one of the members. The cases deciding that rated inhabitants are not competent witnesses to increase the fund to be raised by the rate, prove that *Mercer* in this case was incompetent. But it is said that *Mercer* ceased to be a member when he took his fixed salary as secretary, instead of his share as a member of the society. *Mercer*, however, became a member by his execution of the deed, and the parol agreement to take the fixed salary instead of his share will not cancel his liability under the deed. It is next said that the release executed by *Mercer* rendered him a competent witness. That, however, is a release the wrong way, as it is *Mercer* who releases his claim of salary, whereas it ought to be a release by every member of the society of *Mercer's* liability under the deed. The case of *Wilson* v. *Hirst* (*a*), in the report of which most of the cases on the subject are collected, is distinguishable, as in that case there were releases on both sides. The case of *Cheyne* v. *Koops* (*b*) is perhaps scarcely an authority to shew this witness was not rendered competent by the release. The cases of *The King* v. *Bishop Auckland* (*c*), *Oxenden* v. *Palmer* (*d*), and *Tothill* v. *Hooper* (*e*), shewing that rated inhabitants are incompetent witnesses to in-

(*a*) 4 Barn. & Adol. 760; 1 Nev. & Man. 742.
(*b*) 4 Esp. 112.
(*c*) 1 Adol. & El. 744; 1 Mood. & Rob. 286.
(*d*) 2 Barn. & Adol. 236.
(*e*) 1 Mood. & Rob. 392.

Bail Court.

RIGBY and others v. WALTHEW.

crease the fund to be raised by the rate, and all that class of cases, must be overruled before it can be held that *Mercer* was a competent witness.

R. Alexander and *Walton, contrà.*—*Mercer* was no doubt originally a member of the society, as appears by his examination on the *voire dire*, but then it equally appears by that examination that he had ceased to be a member, for it is clear that the original share was given him merely as secretary, and on finding that share inadequate to his services, he took the salary of 12*l.* a-year, when it was agreed he should cease to be a member, and that his share should be cancelled. In the case of *Radburn* v. *Morris* (*a*), the principle on which persons are deemed incompetent witnesses is correctly laid down, and when that principle is applied to the present case, it will be seen that *Mercer*, though a member of the society, is not an incompetent witness. The case of *Nowell* v. *Davis* (*b*), in which the case of *Paull* v. *Brown* (*c*) was cited and confirmed, is an authority to shew *Mercer* was a competent witness. In *Paull* v. *Brown*, a distinction was drawn between the case of a creditor of a bankrupt, who is an incompetent witness for the assignees, and that case, which was the case of the creditor of an intestate proving a debt due to the estate, and the Court approved of that distinction. That distinction, in the same way, is applicable to this case. It should moreover have been shewn clearly at the time the objection to *Mercer* was made, by the person who made the objection, that he was still a member of the society. In *Doe* d. *Hobbs* v. *Cockell* (*d*), the judgment of *Williams*, J. is very strong to shew that that is necessary. In this case, although *Mercer* may be considered an incompetent witness as an original member, still he may have ceased to be a member under the provisions in the deed allowing any member to retire, and it was the duty of the party making this objection to shew that he had not done so. Even, however, if *Mercer* was in the first instance an incompetent witness, still the release he executed was sufficient to make him competent. The case of *Goodtitle* d. *Fowler* v. *Welford* (*e*), and a number of other cases, might be cited to shew that the release that has been executed by *Mercer* rendered him a competent witness. It is recited distinctly in the release, that his share was cancelled, and the trustees, who are the present plaintiffs, by accepting it, have discharged him of his liability under the deed. It would be impossible for him to make any claim on the funds of the society, as this release would clearly be an estoppel. So in case the trustees were to sue him for the 12*s.* monthly subscription, would not their acceptance of this release be an estoppel to them? At any rate, it would be a case in which a Court of Equity would issue an injunction. In this case there is no point arising as to the liability for the costs, as they of course are to be paid by the defendant, it being a judgment by default.

Cur. adv. vult.

WILLIAMS, J. afterwards (*May* 8th) gave judgment.—This was an application to set aside a writ of inquiry before the under-sheriff, on an alleged mistake in law of the under-sheriff in rejecting the evidence of a witness as

(*a*) 1 Moore & Payne, 648; 4 Bing. 649; 3 Car. & Payne, 254; see also *Bent* v. *Baker*, 3 Term Rep. 27.
(*b*) 5 Barn. & Adol. 368.
(*c*) 6 Esp. 34.
(*d*) 4 Adol. & El. 478.
(*e*) Doug. 134.

incompetent. This inquiry was against the surety of a bond given to the trustees of the *Liverpool Building Society* on a person named *Ford* becoming a member of the society. It appeared that the society was constituted by deed bearing date in *December*, 1825. The deed was executed by the trustees, of whom the survivors were the plaintiffs in the action. It was also executed by every member of the society, each of whom covenanted to pay 12*s.* monthly subscription, and this was to be paid until every member had taken up his share of 120*l.* There were several provisions in the deed, and amongst the rest was the 13th, which is material in the present case. It was to the following effect: that all fines, subscriptions, redemptions, and premiums, paid by the members, were to be considered joint property, and were to go to the augmentation of the general fund; so that it appears that all and every member was interested in the extent and amount of that which was declared to be the joint property of the members. Now on the writ of inquiry, a person named *Mercer* was called as a witness for the plaintiffs, and it appears that he was secretary to the society, and that he was in that situation at a certain salary. He was called, and on the *voire dire* he was asked whether he was not a member of the society; he said that he had signed the deed; and it also appeared that he had been a member by his signature to that deed. The first question was, whether he, being a member, was interested in the result of the inquiry, as his evidence might affect the amount of the funds of the society, in which all the members were jointly interested. Standing simply on that question, it seems to me that there is no doubt, that being a member, he was interested in the result of the inquiry. But then it was contended, that as this objection was raised on the *voire dire*, so it might be removed on the *voire dire*, so as to set *Mercer* up again as a competent witness. It is necessary, therefore, to see if any thing appears on the notes of the under-sheriff to shew that he was so set up again. It appears that he then said that he had signed the deed in 1825; that the share was given him instead of a salary as secretary; that in 1834 it was agreed he should have in future a salary of 12*l.* a year, and that he had received that salary since. Now on that examination there is nothing to shew but that he was still a member of the society, and therefore it seems to me that the consequence follows, that he was interested in the funds under the 13th rule, which funds were to be affected by the result of the inquiry. Then, as to the question of the release (alluded to by another witness), it purported to be a release of all claims and demands that *Mercer* had on the trustees. It recited various circumstances, and, amongst others, that *Mercer* had ceased to be a member of the society. I cannot consider that that recital operated to make him cease to be a member, and I do not think that his interest is thereby extinguished; and its other operation in releasing his demands for his salary, is, as was observed in argument, a release the wrong way. It is not a question whether *Mercer* has acquitted the plaintiffs, but whether he is interested in the fund which by the deed is declared to be for the benefit of all the members of the society. I think, therefore, that the witness *Mercer* was neither set up on the *voire dire*, nor does the release remove the objection that he had an interest to enlarge the fund. The under-sheriff was therefore right in point of law.

It was then agreed that there should be a new inquisition on certain terms.

Rule accordingly.

Bail Court.

LAMBERT and another *v.* COOPER and others.

On an application by a defendant under the Interpleader Act, where the claimant does not appear, the Court will not allow the costs of the rule to be paid out of the fund in dispute.

THIS was an action brought by the plaintiffs, who were assignees of *Walker*, a bankrupt, for the price of some cloth. The cloth had been sold to the defendants by a factor, *Wise*, in his own name, and part of the value had been paid to him. *Wise* became bankrupt, whereupon *Walker*, who was quite unknown to the defendants, claimed the value of the cloth. The assignees of *Wise* also claimed it. The defendants did not dispute their liability to pay the sum claimed to one of the parties, and had stated that they were ready to pay whichever was entitled to it. The plaintiffs then commenced this action, and the defendants obtained the usual rule under the Interpleader Act, 1 & 2 *Will.* 4, c. 58, s. 1, calling on the assignees of *Wise* and the plaintiffs to appear and state the nature of their claims. The assignees of *Wise* did not now appear on this rule to support their claim.

Addison, for the plaintiffs.—As the assignees of *Wise* do not appear to support their claim, and the defendants do not dispute their liability, the Court will make a rule that the claimants be barred their claim, and that the action be stayed on payment of the debt and costs, and that each party pay his own costs on this rule. There may be some question whether the Court has power to order the claimants to pay the costs of this rule, as the language of the third section of the Interpleader Act only says that the Court may, on the non-appearance of the claimant, make such order between the *defendants and the plaintiffs* as to costs, as may appear reasonable: whereas the sixth section directs that the costs of all proceedings, on an application by a sheriff, "shall be in the discretion of the Court." Under these circumstances, as the defendants are greatly relieved by this statute from conflicting claims, the most equitable course will be to make each of these parties pay his own costs of this rule.

Swann, for the defendants.—It is submitted that this Court will order the costs of this rule to be paid out of the fund which is in dispute. That is what Courts of Equity do where a party has acted *bonâ fide* as the defendants in this case have done. The cases of *Cotter* v. *The Bank of England* (*a*), *Parker* v. *Linnet* (*b*), *Duear* v. *Mackintosh* (*c*), and *Scales* v. *Sargeson* (*d*), which have arisen on the Interpleader Act, 1 & 2 *Will.* 4, c. 58, also favour the position that the costs should be paid out of the fund in dispute.

WILLIAMS, J.—All the facts are agreed upon in this case, and the principle also, with the exception that the applicant claims to have the costs of this rule paid out of the fund in dispute. The applicant, however, has overlooked the beneficial situation he is placed in by the Interpleader Act. If that act had not been passed, both the present plaintiffs and the person who has made the claim, might have proceeded against them, and they would have had no relief except by the expensive mode of proceeding in equity. Now, although they have done nothing wrong, they are relieved by this summary and cheap application, and they have therefore a great benefit conferred on

(*a*) 2 Dowl. P. C. 728; 3 M. & Scott, 180.
(*b*) 2 Dowl. P. C. 562.
(*c*) 2 Dowl. P. C. 730; 3 M. & Scott, 174.
(*d*) 4 Dowl. P. C. 231.

them. But why is the fund in dispute to be diminished? What harm has the original vendor of these goods done? If there is any delinquent, it is the persons who have put forth an idle claim; but they are not before the Court, and it may be doubtful if the Court can award costs against them. If they were here, I would undoubtedly, if I had power, allow the costs against them. There can therefore be no costs allowed to the applicants out of the fund in dispute. If a fresh application is made to the Court to order the persons who made the claim, to pay the costs of this rule, as to the power to do which I give no opinion, that question may then be discussed. The rule must therefore be, that the claimants be barred of their claim, and that the action be stayed on the payment of the debt and costs of the action, but not of the costs of this rule.

Rule accordingly.

HARRISON *v.* WALLINGBOROUGH.

A defendant sued as the director of a company, who was also an attorney, entered an appearance *as attorney;* a plea was then pleaded by the company's attorney, there having been no order to change the attorney;—*Held*, that the plaintiff could not treat the plea as a nullity and sign judgment.

THIS was an action for wages, brought against the defendant as one of the directors of the *West Cork* Mining Company. By a private act of incorporation, power was given to sue any one of the directors. The defendant, who was also an attorney of the Court, entered an appearance to the action *as attorney* and not as in person. On the 20th of *April* a plea was delivered in the form "The defendant, director of the said company as aforesaid, by *William Henry Green* his attorney, &c." There had been no order to change the attorney. This plea was taken back to *Green*, who refused to take it back, and then the plaintiff the next day signed judgment as for want of a plea, treating the plea delivered as a nullity. A rule having been obtained to shew cause why this judgment should not be set aside for irregularity with costs,

Bagley shewed cause on affidavits, shewing that the object of the company in defending the action was merely for delay; that the board of directors had authorized *Green* to plead, but that he had not received any authority from the defendant himself; and that the defendant had opposed the other directors at their meeting, when they resolved to defend the action. He contended that the defendant was entitled to appear as attorney in the action, as he had done, and that the plea having been pleaded by another attorney, without any order to change the attorney, the plaintiff was entitled to treat the plea as a nullity, and sign judgment.

Butt, contrà, stated that by the act of parliament the defendant was not personally liable to costs, and that because the defendant happened to be an attorney of the Court, he was not entitled to enter an appearance as attorney in the action, and then collude with the plaintiff in opposition to the other directors, and object to there having been no order to change the attorney.

WILLIAMS, J.—This was clearly an irregularity, the defendant in fact appeared in person, but, happening to be an attorney, entered the appearance as attorney.

Rule absolute. The costs to be paid *to the attorney* for the company.

Bail Court.

REEDER *v.* QUICK and another.

Rule for judgment on an old warrant of attorney refused, where the affidavit stated that the deponent believed the defendant to be alive from information he had received; but did not state he believed the information to be true.

HOGGINS moved for leave to enter up judgment on an old warrant of attorney, on an affidavit stating that one of the defendants had been seen alive within a few days, and that, as to the other, the deponent "had made inquiries, and from those inquiries he verily believed that the defendant was alive on the 15th of the present month of *April*," but there was no statement that the deponent believed the information he had received to be true.

WILLIAMS, J.—That is not sufficient.

Rule refused.

JACOBS *v.* GRIFFITHS.

Rule for judgment on an old warrant of attorney granted, on an affidavit of a person who had paid a check in the handwriting of the defendant a few days previously.

PALMER moved on the 4th of *May*, for leave to enter up judgment on an old warrant of attorney, on an affidavit of the cashier of an army agent in *London*, stating that he had on the 1st of *May* paid a check dated at *London* a few days previously, which he swore was in the handwriting of the defendant.

WILLIAMS, J. granted the rule.

Rule granted (*a*).

(*a*) See *Gray* v. *Withers*, 1 Har. & Wol. 659; 4 Dowl. P. C. 636; and *Saunders* v. *Jones*, 1 Dowl. P. C. 367.

MYLETT *v.* HUCKER.

If a plaintiff sues as a pauper, a rule cannot be granted that he should find security for costs, on the ground that he is insolvent, until after he has been dispaupered.

THIS was an action for distraining for more rent than was due, and for an excessive distress. The action had been commenced in the Sheriff's Court of *London*, and had been removed into this Court by the defendant. The plaintiff sued in *formâ pauperis*. The plaintiff had since become insolvent, and had petitioned for his discharge under the Insolvent Act. A provisional assignee had been appointed, who had refused to interfere with the action. No assignees had been appointed by the creditors. Notice of trial had been given since the plaintiff petitioned for his discharge. Application had been made to the provisional assignee, and to the plaintiff's attorney, for security for costs, but it had been refused. A rule having been obtained to shew cause why proceedings should not be stayed until the plaintiff found security for costs;

Mansel shewed cause.—This is not a cause of action which passes to the assignees under the Insolvent Act, 7 *Geo.* 4, c. 57. It is merely an action for unliquidated damages, and as it does not pass, the plaintiff is not bound to give security for costs.

Dowdeswell, contrà.—The cases of *Doyle* v. *Anderson* (*a*), and *Heaford* v. *M'Knight* (*b*), shew that the Court will compel security for costs to be given if the right of action passes to the assignees. This cause of action clearly passes to the assignees by the words of the Insolvent Act, 7 *Geo.* 4, c. 57, which are as strong as the words of the Bankrupt Act; and it has been held in a variety of cases, that actions similar to the present do pass to the assignees of a bankrupt (*c*).—[*Coleridge*, J.—I think that is not the point of this case; it turns on the fact of the plaintiff having obtained an order to sue as a pauper.]—Still it is reasonable he should give security for costs, this action being for the benefit of the assignees. In the case of a person suing by *prochein amy*, the Court will compel security for costs to be given. This rule cannot be discharged without overruling the cases of *Doyle* v. *Anderson*, and *Heaford* v. *M'Knight*. The cases of *Mason* v. *Polhill* (*d*), and *Fetcher* v. *Law* (*e*), may also be cited in favour of this rule.

COLERIDGE, J.—It seems to me that this motion is misconceived, and that the case is distinguishable from the cases of *Doyle* v. *Anderson*, and *Heaford* v. *M'Knight*, and on these grounds: the plaintiff has been placed in a situation, by a competent authority, to prosecute his action without being liable to any costs; he is in that situation under the provisions of a statute (*f*), and still remains in it. Since the time he was placed in that situation other circumstances have arisen, and it is stated that he is now carrying on the action for the benefit of other persons. In the first instance, therefore, application should be made to dispauper the plaintiff, and he will then be in the situation in which the plaintiffs were in the cases of *Doyle* v. *Anderson*, and *Heaford* v. *M'Knight*. I think, therefore, that that should first be done. This rule must therefore be discharged, the costs to be costs in the cause.

Rule discharged accordingly.

Dowdeswell then obtained a rule, calling on the plaintiff to shew cause why he should not be dispaupered, or why the defendant should not be at liberty to plead the insolvency of the plaintiff, *puis darrein continuance*, without the usual affidavit that it was within eight days previously (*g*).

(*a*) 2 Dowl. P. C. 596.
(*b*) 2 Barn. & Cress. 579; 4 Dowl. & Ryl. 81.
(*c*) *Handcock* v. *Caffyn*, 8 Bing. 359, 1 M. & Scott, 521; *Porter* v. *Vorley*, 9 Bing. 93, 2 M. & Scott, 141; *Smith* v. *Coffin*, 2 H. Black. 451.
(*d*) 2 Dowl. P. C. 61; 1 Cromp. & Mees. 620; 3 Tyr. 595.
(*e*) 5 Nev. & Man. 351; 1 Har & Wol. 430; see also *Foss* v. *Wagner*, 2 Dowl. P. C. 499.
(*f*) 23 *Hen.* 8, c. 15, s. 2.
(*g*) See *Reg. H.* T. 4 *Will.* 4, 2 Dowl. P. C. 313; and the case of *Powell* v. *Duncan*, *ante*, 198.

LYDDON *v.* COOMBS and another.

THIS was an action of debt for horse-meat supplied, to which the defendant *Coombs* had pleaded he never was indebted; the other defendant suffered judgment by default. The sum claimed was 2*l.* 14*s.* The cause was tried before the sheriff under the statute 3 & 4 *Will.* 4, c. 42, s. 17;

The Court will not grant a new trial on the ground of the verdict for the defendant being against evidence, in a case tried before the sheriff, where the sum sought to be recovered is under 5*l.*

Bail Court.

LYDDON v. COOMBS and another.

and the question in dispute was, whether *Coombs* was partner with the other defendant who had suffered judgment by default. The jury thought that *Coombs* was not partner, and found a verdict for him. A rule *nisi* having been obtained for a new trial, on the ground that the evidence was so clear to establish a partnership, that the jury ought to have been directed that there was a partnership,

Bere shewed cause.—A preliminary objection to this rule is, that it is not a case in which the Court will grant a new trial. The ground on which a new trial is asked, is, that the verdict is against evidence. The Courts have decided that they will not grant a new trial for such a cause, in cases tried at *Nisi Prius*, where a verdict is given for the plaintiff for less than 20*l.*; and in the case of *Young* v. *Harris* (*a*), the principle of that rule was extended to cases where a verdict was found at *Nisi Prius* for the *defendant*, and where the *claim* made was under 20*l.* Since the statute allowing writs of trial, 3 & 4 *Will.* 4, c. 42, s. 17, it has been decided in the case of *Packham* v. *Newman* (*b*), that a new trial will not be granted to the defendant in a case tried before the sheriff, on account of the verdict for the plaintiff being against evidence, where the verdict is for less than 5*l.* It is now submitted, that by analogy with the case of *Young* v. *Harris*, that rule should be extended to this case, the verdict having been found for the *defendant* in a case where the *claim* is for less than 5*l.*

Bingham, *contrà*, contended that the ground of the motion was as much for a misdirection as on account of the verdict being against evidence.

WILLIAMS, J.—How can I say whether there was a partnership, without looking to the facts of the case? This is clearly a rule for a new trial on the ground of the verdict being against evidence, and the rule must therefore be discharged, the sum claimed being less than 5*l.*

Rule discharged.

(*a*) 2 Cromp. & Jer. 14; 2 Tyr. 167. (*b*) 1 Cromp. M. & Ros. 585; 5 Tyr. 215.

CLOSE *v.* PARKER.

Distringas, for the purpose of compelling an appearance granted, where every exertion had been made, but without success, to discover the residence of the defendant.

THIS was an action for criminal conversation. The defendant had been living some time at the plaintiff's house, and in the month of *October*, 1834, eloped with the plaintiff's wife. He then went into lodgings at a place that was known, but where he remained a very short time. Subsequently he had been advertised in several newspapers, and every endeavour possible had been made to discover where he was living, but without success. A person named *Lee* was in the receipt of some rents for him, and he had said that he was in communication with the defendant, and would forward any thing to him, but refused to forward the writ of summons in this action. In *Hilary* term last application was made to the Court to allow service of the writ of summons to be made on *Lee*, but the Court refused the application (*c*). Since that application three calls had been made, and a copy of

(*c*) See the case, *ante*, 71.

the summons left at *Lee's* house, as is usually required previous to granting a *distringas* to compel an appearance. The same had been done at the house where the defendant was in lodgings for a short time. The same had also been done at the *plaintiff's* house, as that might be considered his last place of residence. It was sworn on the affidavits in support of the present application, that it was believed the defendant kept out of the way to avoid service of the process.

Chilton now applied to the Court for a *distringas* to compel an appearance.—It is submitted that every thing has been done in this case which the Court can require previously to issuing a *distringas*. All that the statute 2 & 3 *Will.* 4, c. 39, s. 3, requires, is, that it should be made to appear *to the satisfaction* of the Court that the defendant has not been personally served with the writ of summons, and cannot be compelled to appear without some more efficacious process.—[*Coleridge*, J.—Are there any cases reported as to what the Court requires previous to issuing a *distringas* in cases where the defendant's abode cannot be discovered ?]—No, there are not.—[*Coleridge*, J. —My apprehension is, that there may be injustice in granting this application, as the defendant may have been abroad before the action was commenced.]—The Court will grant a *distringas* for the purpose of proceeding to outlawry if the defendant is abroad (*a*), and it is submitted, that if the plaintiff in this case has shewn, to the satisfaction of the Court, that he has used every exertion to serve the defendant, he is entitled to the *distringas*, and that he is not bound to say whether he wants it for the purpose of proceeding to outlawry or of compelling an appearance. There is no doubt but that in the case of *Fraser* v. *Case* (*b*) it was said by the Court of *Common Pleas*, that the party applying must elect for what purpose the *distringas* is to issue; but the point was not much discussed, and there is nothing in the statute to warrant the distinction.—[*Coleridge*, J.—It is a mistake to say the plaintiff is *entitled* to the *distringas;* it is a matter for the *discretion* of the Court, and in exercising that discretion the Court puts the plaintiff to his election, and will see to what purpose the *distringas* is to be applied.]—A *distringas* for the purpose of proceeding to outlawry, will be of no use to the plaintiff, as his object is to obtain a verdict with damages, so as to entitle him to apply to parliament for a divorce. If, therefore, this writ is not granted, it will be a great hardship on the plaintiff.

COLERIDGE, J. then granted the writ of *distringas* as required.

Chilton, in the following *Trinity* term, applied for leave to enter an appearance for the defendant, the sheriff having returned *non est inventus* and *nulla bona* to the *distringas*. The affidavit on which he moved shewed again the attempts that had been made without success to discover the defendant and his property. He cited the case of *Copeland* v. *Neville* (*c*).

COLERIDGE, J. granted the application.

Rule accordingly.

(*a*) *Harding* v. *Manners*, 2 Har. & Wol. 80; *Moon* v. *Thynne*, 3 Dowl. P. C. 153; *Hewitt* v. *Melton*, 1 Cromp. & Mees. 720; 3 Tyr. 822.

(*b*) 2 M. & Scott, 720; 9 Bing. 464: 1 Dowl. P. C. 725.

(*c*) 4 Dowl. P. C. 51; 1 Har. & Wol. 374.

Bail Court.

Ex parte BENNETT.

A clerk having been articled to an attorney who died, the Court referred it to the master to ascertain how much of the premium paid should be returned by a surviving partner of the attorney.

THE father of the applicant applied to *Kirk*, an attorney, to take his son as an articled clerk. *Kirk* said he already had got two articled clerks, and it was then agreed between *Kirk* and the applicant's father, that the applicant should be articled to *Kirk's* partner, *Constable*. This was done, and 100*l.* was paid to *Kirk* when he was articled. *Constable* very seldom attended at the office and was since dead. *Kirk* had since refused to take the applicant for the remainder of his time.

Platt shewed cause against a rule which had been obtained, calling on *Kirk* to shew cause why it should not be referred to the Master to ascertain what part of the premium should be returned by him.

Crowder, contrà, cited *Ex parte Prankerd* (*a*), and *Cuffe* v. *Brown* (*b*).

COLERIDGE, J.—The case of *Ex parte Bayley* (*c*) seems exactly in point, for there the Court ordered a surviving partner to refund a portion of the premium paid on his being articled to the partner, who was dead.

Rule absolute.

(*a*) 3 Barn. & Ald. 257. (*b*) 5 Price, 303. (*c*) 9 Barn. & Cress. 691.

CLAYTON *v.* MARSHAM.

Distringas refused where only two calls had been made, although the defendant had said he would take good care that the plaintiff should not serve him with a writ.

HELPS moved for a *distringas* to compel an appearance. There had been only two calls made instead of three, as was in general required, and on the second call a copy of the writ had been left. There was an affidavit also of a person who swore that he had had several interviews with the defendant on the subject of the matter in dispute, and that the defendant had said he would take good care that the plaintiff should not serve him with a writ. It was submitted that after that declaration it was unnecessary to make the usual three calls, as the only object of requiring those three calls to be made was to ascertain that the defendant was keeping out of the way, which in this case it was clear he was doing. The judgment of Lord *Lyndhurst* in the case of *Hill* v. *Moule* (*d*), and the case of *White* v. *Western* (*e*), were cited as authorities in favour of the application.

WILLIAMS, J.—I do not see why a third call might not have been made in this case as in others, at which the copy of the writ might have been left. The rule cannot be granted.

Rule refused (*f*).

(*d*) 2 Dowl. P. C. 10; 1 Cromp. & Mees. 617; 3 Tyr. 162, n.

(*e*) 2 Dowl. P. C. 451; see also *Hickman* v. *Dallimore*, 1 Har. & Wol. 524; 4 Dowl. P. C. 278.

(*f*) See *Stroud* v. *Leslie*, *post*, 218.

DEBNEY *v.* CORBET and another.

A local act of parliament gave a power of distress, and enacted, that if informally made, the parties making it should not be deemed trespassers *ab initio*, but that persons aggrieved might recover satisfaction in an action on the case. By another clause treble costs were given in actions brought against persons who were acting under the act, if the plaintiff should discontinue his action, &c. A distress was made under the act, but in the notice of distress it was stated to be made under another local act. An action of trespass was then brought, but was discontinued: —*Held*, that the defendant was entitled to treble costs.

THIS was an action of trespass brought on account of a distress that had been made for a paving rate in the parish of *St. Pancras*. There were two local acts in that parish; one the 48 *Geo.* 3, c. lxxxvi, being an act for regulating an estate called *Skinner's Estate;* the other, the 50 *Geo.* 3, c. clxx, for regulating another estate called *Harrison's Estate*. It was under the latter act that the distress in question was made; but in the notice of the distress, given at the time it was made, it was stated to be "made under the statute 48 *Geo.* 3, intituled," &c. The amount of the rate for which the distress was made was properly mentioned in this notice. This action of trespass was then commenced against *Corbet*, who was the collector of the rate, and the other defendant, who was the broker who made the distress. They pleaded the general issue, there being a clause in the 50 *Geo.* 3, c. clxx, empowering them to give the special matters in evidence under that plea. After notice of trial was given, the plaintiff, the day before the trial, withdrew the record and entered a discontinuance at the recommendation of counsel, who thought that the mistake in the notice of distress as to the act under which the distress was in fact made, would not prevent the defendants from proving at the trial that they acted under the 50 *Geo.* 3. By a clause in the 50 *Geo.* 3, it was enacted, that a distress made under it should not be unlawful for defect of form, and that if informally or improperly made, the persons making it should not be deemed trespassers *ab initio*, but that the persons aggrieved might recover full satisfaction in an action on the case. There was also a clause enacting, that if the plaintiff, in any action against any person for any thing done under or by virtue or in pursuance of that act, should become nonsuit or discontinue his action &c., he should pay treble costs to the defendant. In taxing costs the Master allowed the defendants single costs only; whereupon a rule having been obtained to shew cause why the Master should not review his taxation, in order that he might allow the defendants treble costs under this clause;

Hoggins, shewed cause.—The defendants, by giving notice of the distress, as made under the statute 48 *Geo.* 3, have misled the plaintiff, and they have no right, after having done so, and the plaintiff has brought his action for that which from this notice he supposed to be an illegal distress, to turn round and say that they were acting under another statute. It could not have been the intention of the legislature to give such a power, when the clause was enacted authorising the special matter to be given in evidence under the general issue. Even, however, if the defendants had a right to give evidence at the trial that they were acting under the 50 *Geo.* 3, notwithstanding the notice of distress, still, under these circumstances, the defendants cannot be entitled to treble costs. It is the informal notice of distress that has provoked this action, which would never have been brought but for that informality. Another objection to this rule is, that the 50 *Geo.* 3, enacts, that persons aggrieved for any thing done under that act are to recover in an action on the case, and are not to be deemed trespassers *ab initio*. Now this is an action of trespass, and not an action on the case; and not being an action under that statute, the defendants are not entitled to treble costs.

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v.
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and another.

Petersdorff, contrà.—There is nothing in the affidavits to shew that this action was commenced on account of the mistake in the notice of distress; and indeed it is quite clear on the affidavits that it arose from vexatious opposition. The only question for the Court now to consider is, whether the defendants were in fact acting under the stat. 50 *Geo.* 3, c. clxx, when they made the distress; and whether the action was defended on the ground that they were so acting, the mistake in the notice of distress being perfectly immaterial. Those facts are clearly shewn on these affidavits; and it follows as an immediate consequence, that this action being brought for a thing done in pursuance of that act, and the plaintiff having discontinued the action, the defendants are entitled to treble costs. It is also said that the defendants cannot recover treble costs, because this is an action of trespass, instead of an action on the case. It cannot however be contended, that a *defendant* is not to be entitled to treble costs, because a plaintiff chooses to commence an action in a different form from that to which he is confined by the act. The clause giving treble costs is general in its language, that in *any* action, &c., and cannot be construed to mean any *action on the case* to be brought in particular cases under another clause. The simple question only is, was this an act done under or by virtue or in pursuance of this act, which it is clear on the affidavits it was. The case of *Finlay* v. *Seaton* (*a*) is a case bearing on the point; and here, as in that case, it appearing clearly to the Court what the authority was under which the defendants were acting when they did the acts complained of, and for which the action is brought, the Court will in like manner award the defendants treble costs.

Cur. adv. vult.

WILLIAMS, J. afterwards (*May* 8th) gave judgment. This was an application calling on the plaintiff to shew cause why the Master should not review his taxation, he having allowed the defendant single costs only, and the question was, whether under the circumstances he should not have allowed treble costs under the provisions of the statute 50 *Geo.* 3, c. clxx, s. 65. By that section it is provided, that if the plaintiff in any action against any person for any thing done under, or by virtue or in pursuance of that act, should become nonsuit or discontinue his suit, &c., he should pay treble costs to the defendant; and the question is, whether, under that section, trèble costs ought to be allowed, or single costs only. The question arose thus; a distress was made on the plaintiff for arrear of rates, and it was described, in the notice of distress served, in the following terms: "Take notice, that by virtue of a warrant to me directed, I have distrained the goods and chattels in the annexed schedule specified for the sum of 14*l.* 18*s.* 4*d.*" (this sum was properly described) "for so much rate for paving, duly made under the statute 48 *Geo.* 3, intituled an act, &c., due at *Lady-day*, 1833." Now this was a misrecital and a misdescription of the statute, for the 48 *Geo.* 3, c. lxxxvi, was a different one from that under which the proceedings were really had, and on which the parties acted, namely, the 50 *Geo.* 3, c. clxx. I have observed that the precise amount was truly stated; the reason of the distress was also, and there was only a misrecital and misdescription of the statute; and the question mainly was, whether this mistake in the recital of the statute under which the parties undertook to act will preclude me from

(*a*) 1 Taunt. 210.

taking notice that they were really acting under the 50 *Geo.* 3, c. clxx. It appears by the affidavits that the counsel who advised the plaintiff did not think so, for they thought that if a party making a distress had good and tenable grounds for doing so, he might notwithstanding avail himself of it. If they had not thought so they would not have recommended the plaintiff to discontinue this action. This is an old and well-established principle of law, and the Court recognised it in the case of *The Governor &c. of the Poor of Bristol* v. *Wait* (*a*), and I therefore am not precluded from looking at the real acts of the parties. If that be so, then I am satisfied that these defendants were acting under the statute of 50 *Geo.* 3, c. clxx, and that they had an undoubted authority so to act. It is next said, that under the 64th section of that statute, where any distress is improperly or informally made under that act, that the persons making it are not to be considered as trespassers *ab initio*, but that the persons aggrieved are to recover full satisfaction in an action on the case. Now it is contended, that as this is an action of trespass in its form, it is impossible on the present occasion for the defendants to say they were acting under the 50 *Geo.* 3, as an action of trespass could not be maintained. I cannot however assent to that argument; because the *plaintiff* is mistaken in his course of proceeding that is not to prevent the defendant from saying he was acting under the statute; it cannot have the effect of rendering his past acts unwarranted. Suppose the plaintiff had brought an action of debt on some supposed penalty which is not in fact given by the statute; if the defendants had really been acting under the statute, would it extinguish their right to say that they were so acting? So here, the plaintiff brings an action of trespass instead of case; that is his own blunder, but it cannot affect the rights of other parties. For these reasons, I think the Master, when he allowed the single costs only, (which he did in order to bring the question before the Court) was mistaken, and that therefore this rule must be made absolute.

Rule absolute.

(*a*) 1 Adol. & El. 264; 3 Nev. & Man. 359; 6 Car. & Payne, 591.

BONNEFOR *v.* RUSSELL.

If a defendant has made default by not putting in bail in time, and proceedings are taken on the bail-bond, after which bail is put in, the defendant cannot move that the plaintiff should find security for costs until he has had the proceedings on the bail-bond stayed.

THE defendant in this case made default in putting in bail above, whereupon the plaintiff took an assignment of the bail-bond, and commenced proceedings against the bail. Bail above was then put in and justified, and a rule *nisi* obtained to stay proceedings on the bail-bond on payment of costs, which rule was still undisposed of. A rule was also obtained to shew cause why the plaintiff should not find security for costs, as he was resident abroad. Against the latter rule,

Barstow, shewed cause.—A preliminary objection is, that at the time this rule *nisi* was granted, the defendant was in default by not putting in bail in time, he was therefore not in Court to make this motion, and it was necessary he should purge that default by having the proceedings against the bail stayed before he could take a step in the cause. Until that is done, it cannot

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be known that the plaintiff will ever proceed in the cause, as he cannot proceed both in it and against the bail also.

Humfrey, contrà.—All that is necessary is, that the defendant should be in Court when this motion was made, which he was immediately that bail above was put in and justified. Being in Court, the next question is, whether this motion is made promptly, as is generally required by the Court. Had the other rule been first disposed of, it would have been objected that the defendant had taken a step in the cause, and that this application for security for costs was too late. It might, moreover, have so happened, that the defendant would have been obliged to plead before the rule for staying proceedings against the bail could be made absolute. In that case he would be prevented altogether from making this application.—[*Coleridge*, J.—Under those circumstances, the defendant would not be precluded from obtaining security for costs, as it is only required that he should apply *promptly* (*a*)].—Still then when the bail above were put in and justified, the defendant was in Court, and the rule for staying the proceedings against the bail on payment of costs, is such a mere matter of course, that it cannot be necessary to make it absolute before making the present application.

COLERIDGE, J.—The question is, whether the defendant is in Court for the purpose of this application. Now by his default in not putting in bail above in time, proceedings against the bail below are on foot, and while that is the case, the plaintiff cannot proceed in this action; yet while that state of things remains, the defendant makes this motion in the cause. That he cannot do, and therefore this rule must be discharged.

Rule discharged.

(*a*) See the cases of *Fletcher* v. *Law*, 1 Har. & Wol. 430; *Duncan* v. *Stent*, 5 Barn. & Ald. 702; 1 Dowl. & Ryl. 348; and *Gurney* v. *Key*, 1 Har. & Wol. 203; 3 Dowl. P. C. 559; and the rule of Court, *H.* T. 2 *W.* 4, I. 98; 1 Dowl. P.C. 196.

BONNEFOR *v.* RUSSELL.

An affidavit of merits made by the defendant's attorney, must state distinctly that the deponent is attorney for the defendant.

ON the rule to shew cause why the proceedings on the bail-bond, referred to in the last case, should not be stayed on payment of costs, bail above having been put in; the affidavit of merits was made by "*William Russell*, of No. 7, *Norfolk Street*, *Strand*, Gentleman," but he did not describe himself as the attorney for the defendant, which in fact he was. There was also an affidavit of a person describing himself as "clerk to *Howard* and *Russell*, of No. 7, *Norfolk Street*, *Strand*, attornies of the defendant." It also appeared on the affidavits, that *William Russell*, who was living at the same place, had acted as the attorney of the defendant.

Barstow took a preliminary objection, that the affidavit of merits should have stated distinctly that the person making it was the *attorney of the defendant*, and that the deficiency could not be supplied by the other affidavits. He cited the case of *Morris* v. *Hunt* (*b*), which had already been acted on in a case in this Court this term (*c*).

(*b*) 1 Chit. 97. (*c*) In the next case, *Rowbotham* v. *Dupree*.

Humfrey, contrà, contended, that it sufficiently appeared from the affidavits that the *William Russell* making the affidavit of merits was the attorney for the defendant.

COLERIDGE, J.—It is quite consistent with this affidavit, that there is a person in the same house of the same christian and surname, but who is not the attorney for the defendant. It is right that affidavits should be in the regular forms, which must be adhered to. This rule must therefore be discharged.

Rule discharged.

ROWBOTHAM *v.* DUPREE.

1. An affidavit of merits made by the defendant's attorney's clerk, on a rule to set aside a judgment, must state he has had the management of the cause.
2. If it does not, the Court will not, on hearing the rule, allow the affidavit to be amended and resworn.

THIS was a rule calling on the plaintiff to shew cause why the judgment, and all subsequent proceedings, should not be set aside on payment of costs. There was an affidavit of merits made by the clerk of the defendant's attorney, in which there was a long statement of the different proceedings in the cause, but he did not state that he had had the management of the cause.

R. V. Richards, on shewing cause, objected that as the affidavit of merits was made neither by the defendant himself nor by his attorney, but by a third person, his clerk, it was necessary that he should swear positively that he had had the management of the cause, or shew that he knew something about it. He cited the case of *Morris* v. *Hunt* (*a*).

J. Jervis, contrà, submitted that the contents of the affidavit shewed that the clerk had had the management of the cause; that the case cited was not of sufficient authority on the point, and that at any rate the Court would allow the affidavit to be amended and resworn.

WILLIAMS, J.—The usual practice is for the party himself or his attorney to make an affidavit of merits. If neither of these persons make it, but a third person, his affidavit must shew that he has a knowledge of the case. Here that is not shewn; the deponent is only described as the clerk to the defendant's attorney, but it does not appear that he has had the conduct of the cause. If I were to allow the affidavit to be amended and resworn, it would be holding out an inducement to persons to make such affidavits in this way (*b*). The rule must therefore be discharged, and with costs.

Rule discharged with costs.

(*a*) 1 Chit. 97. See also *Rex* v. *The Sheriff of Middlesex*, 1 Chit. 732; *Anon.* 1 Smith, 61; and *Neesom* v. *Whylock*, 3 Taunt. 403; and the last case, p. 214.

(*b*) See the next case.

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BOSKAY *v.* LISTER.

On shewing cause against a rule, the Court allowed an affidavit, which omitted the deponent's addition, to be amended and resworn.

PLATT shewed cause against a rule to cancel a bail-bond, the defendant having been twice arrested for the same cause, and produced an affidavit in which the deponent had no addition to his name.

Carrington, contrà, objected to the affidavit being read, as not in compliance with the rule of *H.* T. 2 *Will.* 4, I. 5 (*a*).

Platt asked leave to have the word "gentleman" added to the affidavit, and to have it resworn.

WILLIAMS, J.—I will allow that to be done (*b*).

The objection was then waived.

(*a*) 1 Dowl. P. C. 184. (*b*) See the two last cases.

CALLUM *v.* GRAYSON.

If a defendant makes a demand of declaration before he is entitled to do so, the plaintiff need not obtain a rule to set it aside.

THIS action was commenced on the 14th of *April* by writ of summons. The plaintiff had not declared, but on the 4th of *May* the defendant's attorney made a written demand of declaration in this form: "The defendant demands a declaration." A rule having been obtained on the part of the plaintiff, on the 6th of *May*, to shew cause why this demand of declaration should not be set aside for irregularity, with costs,

Erle shewed cause, and contended that this demand of declaration was a mere nullity, and did not prejudice the plaintiff, as it would not entitle the defendant to sign judgment of *non-pros* under rule 8 *T.* T. 1 *Will.* 4 (*c*).

Mansel, contrà, contended that the demand of declaration was an irregularity, as the plaintiff had until the end of *Trinity* term to declare. Had the defendant signed judgment of *non-pros* four days after this demand of declaration under the rule, and a rule *nisi* for setting aside this judgment been obtained, it would have been objected that the motion was too late, as a rule ought to have been obtained for setting aside this demand of declaration as irregular.

WILLIAMS, J.—It seems to me that the rule of *T.* T. 1 *Will.* 4, is the converse of what is stated. It directs that judgment of *non-pros* shall not be signed for want of a declaration until four days after demand thereof; but it does not state, that if an unnecessary demand of declaration is made, that then the consequence is to follow that judgment of *non-pros* may be signed. If a mere verbal demand had been made, it would have been of no avail; so here, as the defendant had no right to make this demand, in the same way the plaintiff was not bound to obey it. I have no doubt on the point. The rule must therefore be discharged.

Rule discharged.

(*c*) 1 Dowl. P. C. 104.

THEMANS *v.* FENN.

1. An affidavit made in a cause by the defendant is good, though it does not give him any addition.

2. A rule of Court directed a sum of money to be paid to the defendant or his attornies; the affidavit of one of the defendant's attornies stated a demand and refusal, and that the money had not been paid to him, and that he believed it was still unpaid;—*Held*, that this affidavit was sufficient to grant an attachment, without an affidavit from the other partner.

THIS was a rule *nisi* for an attachment against the late attorney for the defendant for non-payment of costs, in pursuance of a rule of Court, and the Master's *allocatur*. The rule *nisi* was granted on two affidavits, one made by the defendant *Fenn* in the form "*George Fenn*, of *Hope Cottage*, in the County of *Surrey*, the above-named defendant, maketh oath and saith, &c." It then stated that *Fenn* personally demanded the sum of money of the attorney, and that he refused to pay it, and that he believed it was still due and unpaid. There was also an affidavit by *Gold*, one of the defendant's present attornies, stating that the money had not been paid to him, and that he believed it was still due and owing, and unpaid, to the best of his knowledge and belief. The rule of Court had ordered the money to be paid to the defendant or his present attornies. *Gold* had a partner in his business.

Mansel shewed cause.—In the first place, the affidavit of the defendant does not comply with the rule of *H.* T. 2 *Will.* 4, I. 5 (*a*), there being no addition to the defendant's name. It will be contended, that where an affidavit is made by the defendant in the cause, and he is so named, it is unnecessary to give him any other addition. The case of *Lawson* v. *Case* (*b*), is however a decision of the full Court of *Exchequer* against that position. The case of *Jervis* v. *Jones* (*c*), was a decision in this Court by a single judge, and cannot be considered to overrule the decision in *Lawson* v. *Case*. The same observation applies to *Jackson* v. *Chard* (*d*). There is also the case of *Sharpe* v. *Johnston* (*e*), but there the defendant was in custody. Another objection to this rule is, that inasmuch as the original rule directed the money to be paid to the defendant or his now attornies, there ought to have been an affidavit by the partner also of *Gold*, stating the money had not been paid to him. The case of *Frances* v. *Wright* (*f*) supports that position.

Swann, contrà.—The invariable practice has been, that where an affidavit is made *in a cause* by the defendant himself, it is sufficient to describe him as the defendant in the cause. The only case which is any authority against this affidavit is that of *Lawson* v. *Case*, but in that case it would rather seem from the report that the only description of the defendant was, "the above-named defendant," which distinguishes the case. The other cases cited are all cases in support of the correctness of the present affidavit. As to the other objection, a personal demand and refusal being directly sworn to by *Fenn*, the affidavit by one of the defendant's attornies, that the money has not been paid to him, and that he believes it is still due and unpaid, is quite sufficient ground for granting this attachment.

WILLIAMS, J., thought that there was nothing in the second objection, a distinct refusal to pay having been sworn to, and it being further stated by

(*a*) 1 Dowl. P. C. 184.
(*b*) 1 Cromp. & Mees. 481; 2 Dowl. P. C. 40; 3 Tyr. 489.
(*c*) 1 Har. & Wol. 654; 4 Dowl. P. C. 610.
(*d*) 2 Dowl. P. C. 469.
(*e*) 1 Hodges, 298; 4 Dowl. P. C. 324; 2 Scott, 407; 2 Bing. N. R. 246.
(*f*) 3 Dowl. P. C. 325.

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the attorney that the money was still due and owing and unpaid, as he believed. The other point was referred for the decision of the full Court.

Swann afterwards, on the last day of the term, mentioned the objection to the full Court, and the Master having stated the usual practice to be to draw affidavits in the same form as the present, the rule was made absolute.

Rule absolute.

BARNARD *v.* SYMONDS.

A defendant must have been confined within the walls of the prison to entitle him to his discharge under the 48 *G.* 3, c. 123.

BALL moved to discharge the defendant under the Small Debts Act, 48 *Geo.* 3, c. 123. The only difficulty was, that the defendant had been confined within the rules of the *King's Bench* prison, and not within the prison itself. The case of *Gilbert* v. *Pape* (*a*) decided, that under those circumstances the defendant was not entitled to be discharged, and referred to the case of *Sumption* v. *Monzani*, as a case decided in the Court of *King's Bench* in *Easter* term, 1836, but it did not appear that in either of those cases the case of *Day* v. *Thomas*, referred to in *Chapman's Practice*, was cited. It was not the intention of the legislature that the defendant should have been actually confined within the walls of the prison for a twelvemonth.

WILLIAMS, J.—The case of *Sumption* v. *Monzani* was a decision of the full Court, and that case decides the present.

Rule refused.

(*a*) 1 Mur. & Hurl. 47; 5 Dowl. P. C. 449.

CAREW *v.* WINSLOW.

Rule to compute made absolute on a service by putting a copy of the rule *nisi* into a letter-box at the defendant's chambers, which was forwarded to him.

R. ALEXANDER moved to make a rule to compute absolute. The affidavit stated that the deponent had served the defendant, by putting a copy of the rule *nisi* into the letter-box at the defendant's chambers, where he resided, and that the deponent called afterwards and saw a person who lived in the same chambers, and who said that he had received the copy and had sent it to the defendant.

WILLIAMS, J. granted the rule.

Rule absolute (*b*).

(*b*) See *Provis* v. *Cantley*, 1 Har. & Wol. 369; *Strutton* v. *Hawkes*, 3 Dowl. P. C. 25; and *Gardner* v. *Green*, id. 343.

STROUD *v.* LESLIE.

Distringas granted where two calls only had been made.

KNOWLES moved for a *distringas* under the following circumstances:—Two calls only had been made at the defendant's house for the purpose of serving the writ of summons; the second call was made according to an appointment made at the first. On the occasion of this second call, a letter was given to the clerk who called, signed by the defendant, in which he said

that he could not be at home at the time appointed, on account of some business he had to attend to, but that if the summons was left at his house, it should be the same as if it was delivered to himself. A copy of the summons was accordingly left. It was submitted, that although the usual three calls had not been made, yet that under these circumstances a *distringas* might be granted.

WILLIAMS, J. granted the rule (*a*).

(*a*) See the case of *Clayton* v. *Mersham*, *ante*, 210.

THEOBALD *v.* BRAME and others.

Where there are several defendants, the names of all should be set out in the title of an affidavit made in the cause.

O'MALLEY shewed cause against a rule *nisi* obtained by *Palmer* for judgment as in case of a nonsuit, and objected to the affidavit on which the rule was granted, that it was intituled "*Theobald* against *Brame and others*," instead of setting out all the names of the defendants. He submitted that the rule must be discharged, and with costs. He cited *Doe* d. *Spencer* v. *Want* (*b*).

WILLIAMS, J. thought the affidavit insufficient, and discharged the rule, but without costs.

Rule discharged accordingly.

(*b*) 2 Moore, 722.

DOE d. FISHER *v.* ROE.

Rule *nisi* for judgment against the casual ejector granted, where service had been on two out of three assignees of the tenant, who was a bankrupt and could not be found.

HOGGINS moved for judgment against the casual ejector.—The premises sought to be recovered had all been let under one lease. The lessee had become bankrupt. The tenants in possession of the greater part of the premises had been served with the declaration. The remainder was vacant and unoccupied. The lessee himself could not be met with, and, in consequence, the declaration had been fixed on the premises, and two out of his three assignees had been served. Several attempts had been made to serve the third assignee, but he could not be met with. It appeared that he was unwell, and was staying from home in the country, and his friends would not say where he was. It was submitted, that as service on the lessee alone would have been sufficient, therefore, under the circumstances, two of his assignees having been served, and the third not having been met with, as above-mentioned, the Court would grant a rule *nisi*.

WILLIAMS, J. granted a rule *nisi*.

Rule *nisi* granted.

Bail Court.

DOE d. DOULAN *v.* ROE.

Rule absolute granted for judgment against the casual ejector, on an affidavit stating a service on *W. S.*, tenant in possession, together with *A. B.*, *C. D.*, and *E. F.*

G. T. WHITE moved for judgment against the casual ejector, on an affidavit stating a service on "*William Smith*, tenant in possession, together with *A. B.*, *C. D.*, and *E. F.*" He submitted that on this affidavit it appeared that the three last-named persons were joint tenants together with *William Smith*, and that as service on one joint tenant was sufficient, he was entitled to have a rule absolute as to all four. He referred to the case of *Doe* d. *Bailey* v. *Roe* (*a*).

WILLIAMS, J.—I think that will do.

Rule absolute granted as to all.

(*a*) 1 Bos. & Pul. 369.

DOE d. MATHER *v.* ROE.

Rule *nisi* granted for judgment against the casual ejector, where service had been on a servant of the tenant, who was residing out of the kingdom.

BUTT moved for judgment against the casual ejector. Service had been effected two days before the term on a servant of Sir *G. Pococke*, who was the tenant in possession on the premises sought to be recovered. The servant said that Sir *G. Pococke* was gone away, and it was sworn that he had left the country and was residing in *France*. It was submitted that this was not the case of service on the servant of a person who was residing in this country, and that therefore the rule might be granted.

WILLIAMS, J. granted a rule *nisi*.

Rule *nisi* granted (*b*).

(*b*) See also *Doe* d. *Treat* v. *Roe*, 1 Har. & Wol. 526; 4 Dowl. P. C. 278; *Doe* d. *Sturch* v. *Roe*, 1 Har. & Wol. 672; *Doe* d. *Tomkins* v. *Roe*, *ante*, 49; and *Doe* d. *Robinson* v. *Roe*, 3 Dowl. P. C. 11.

DOE d. Lord SOMERS *v.* ROE.

Rule *nisi* granted for judgment against the casual ejector, where the tenant had refused to take the declaration, and had shut the door, whereupon it was pushed under.

KELLY moved for judgment against the casual ejector. Service had been effected regularly on all the tenants except two, and those two had shut their doors and refused to open them, so that it had been impossible to serve them. A copy of the declaration and the notice had then been pushed under the doors, and it had been explained in a loud voice to them.

WILLIAMS, J.—You may have a rule *nisi* as to those two tenants, the service of which is to be made in the same way the declaration was served.

Rule *nisi* as to those two, and absolute as to the others.

The KING *v.* The Commissioners of the BEVERLEY Gas Works.

April 29.

Commissioners under two local acts were authorised to pave and light a town and to levy a rate on its inhabitants. They were also authorised to erect or purchase a gas apparatus, and, after sufficiently lighting the streets, to let out gas to individuals: the money arising from the gas so let out to be applied, first, to the defraying the expense of the apparatus, and then the overplus, if any, to be applied generally to the purposes of the act. Under these acts the commissioners purchased gas-works from a person who had always been rated for them to the relief of the poor, and after supplying the town with gas, let out private lights. The money and surplus thus realised was appropriated to the purposes of the acts:—*Held*, therefore, that they were not rateable to the poor-rate, as occupiers of the gas-works, in respect of such surplus.

ON appeal against a rate for the relief of the poor of the parish of *St. Martin's, Beverley,* in which the appellants, by the name of the proprietors of the gas-works, are rated in the sum of 42*l.* for the gas-works and 8*l.* for certain tenements, the sessions confirmed the rate absolutely as to the tenements and as to the gas-works, subject to the following case.

The commissioners are appointed by two several acts of parliament, the 48 *Geo.* 3, c. xxxvii, and the 6 *Geo.* 4, c. cxxxviii, which said acts are to be considered as part of this case. The ground upon which the gas-works in question are erected, is within the parish of *St. Martin's, Beverley,* and was formerly garden ground, and, as such, rated to the relief of the poor of the respondent parish. It was afterwards purchased by one *John Malam,* who erected the works in question upon it, and carried on the business of manufacturing gas there for his own benefit for about two years, during all which time the said *John Malam* was rated to the relief of the poor of the parish of *St. Martin's,* as the proprietor and occupier of the said gas-works. The said commissioners afterwards, in the year 1828, in pursuance of powers conferred upon them by the 6 *Geo.* 4, c. cxxxviii, purchased the said ground, with the buildings standing thereon, being the gas-works in question, from the said *John Malam,* for the sum of 8000*l.*, and are still the proprietors of them, and have since that time carried on the business of manufacturing gas there. For the purpose of completing such purchase, and for other purposes of the said act, the said commissioners have borrowed the sum of 8500*l.*, and, as a security for the same, have mortgaged the rates hereinafter mentioned. In pursuance of the said last-recited act, from and after the purchase of such gas apparatus and premises, the said commissioners have lighted the streets and other public passages of the town of *Beverley* with gas, without contracting for the same, as they had done previously to the said purchase; and they have let out to such persons as were willing to take the same, certain private lights, of the descriptions specified in the said recited act, and have supplied such lights with gas, upon such terms and conditions, and at such annual rents for the same, and in such manner, as the said commissioners have from time to time thought proper. The said commissioners have applied all the money proceeding therefrom to defray the expenses of the said gas apparatus, and other things connected therewith, as by the said last-recited act is directed; and for answering and defraying the expenses of lighting the said streets and other public passages of the said town as aforesaid, and of carrying into execution the several purposes of the said acts, the said commissioners have, from time to time, under the authority of the same, caused the necessary sums to be raised by a rate or rates upon the several tenants or occupiers of premises within the said town, as specified in the said acts, which said sums they have uniformly applied according to the directions of the said acts. The said commissioners are occupiers of the said gas-works and premises, but have no beneficial occupation of, or emolument resulting from the said gas-works, premises, or other subject of the rate, in any personal or private respect. If, under the

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above circumstances, the Court of *King's Bench* is of opinion, that the commissioners are liable to be rated for these gas-works to the relief of the poor, the order of the justices is to be confirmed; but if the Court of *King's Bench* should be of the contrary opinion, then the rate is to be amended, by striking out so much of the rate as relates to the gas-works only.

Archbold, in support of the order of sessions.—The commissioners carry on a trade (*a*), from which a profit has been realised, and they are therefore rateable. According to the *Hospital* case (*b*), it makes no difference whether the surplus realised is applicable to public or private purposes. [Lord *Denman*, C. J.—The distinction between the cases in *Salkeld* and the present is, that there the appropriation of land to the purpose of a hospital was made by an individual; in this instance the land has been appropriated by commissioners under the authority of an act of parliament.]—In *Rex* v. *Tewkesbury* (*c*), and *Rex* v. *Sudbury* (*d*), the defendants occupied as trustees for the benefit of certain burgesses, without any benefit to themselves, yet they were held rateable. These Commissioners resemble the trustees in those cases, and are rateable on the same principle; *Rex* v. *Agar* (*e*), *Rex* v. *St. Giles's, York* (*f*), are to a similar effect. *Rex* v. *Liverpool* (*g*), and *Rex* v. *Weaver*, reported in a note to that case, may be relied on by the appellants. But, in the first of these cases, no surplus could ever have been realised by the trustees, as they were required to lower the dock duties taken by them, as soon as their receipts exceeded what might be necessary for repairs, &c.; and in the latter case also, any surplus was directed to be laid out on the reparation of public bridges and highways.

J. Hildyard, contrà, was not called upon.

Lord DENMAN, C. J.—It is perfectly clear that this rate cannot be supported. Commissioners were appointed for the purpose of lighting, watching, and regulating the streets, ways, and other passages in the town of *Beverley*, by 48 *Geo.* 3; and by a later act, 6 *Geo.* 4, those powers have been enlarged. By both acts they have power to impose rates for the purpose of those acts, and by the second act (the practice of lighting by gas having come into operation,) it is provided, that in case the commissioners shall deem it expedient to erect or purchase a gas apparatus, it shall be lawful for them to let out, or grant to any persons willing to take them, any light or lights. Of this provision they have availed themselves, and having erected

(*a*) By sect. 7, of 6 *G.* 4, c. xxxviii, it is enacted, "That in case the said commissioners shall deem it expedient to erect or purchase such gas apparatus, and to light the said streets, &c., or any of them, with gas, without contracting for the same as aforesaid, it shall be lawful for the said commissioners, after sufficiently lighting such said streets, &c., to let out or grant to any person or persons whomsoever, who shall be willing to take the same, any light or lights, &c., and to supply the same with gas, upon such terms and conditions, and at such annual rents for the same, and in such manner as the said commissioners shall from time to time think proper: provided nevertheless, that all money to proceed therefrom or arise thereby, be, in the first instance, applied to defray the expenses of the gas apparatus and other things connected therewith, *and if there shall be any overplus, then the same shall be applied generally for the purposes of the said recited act and this act.*"

(*b*) 2 Salk. 527.
(*c*) 13 East, 155.
(*d*) 1 B. & C. 390.
(*e*) 14 East, 256.
(*f*) 3 B. & Ad. 573.
(*g*) 7 B. & C. 61.

an apparatus of their own, have let out lights to several persons. From these contracts a profit no doubt is produced to them, and, it is said, that for that profit they are rateable. But the clause empowering them to enter into these contracts, directs also, that the money to proceed therefrom, or arise thereby, shall first be applied to defray the expenses of the gas apparatus, &c., and the overplus, if any, shall be applied generally for the purpose of the acts; and the case finds that all the money proceeding therefrom or arising thereby has been applied according to the directions of the acts. If this rate be enforced, the necessary consequence will be, the imposition of another rate by the commissioners for the purpose of paying it. *Rex* v. *Liverpool*, following a great number of other decisions, has clearly established that, where all the money raised by any public body is expressly disposed of by act of parliament, there is no profitable occupation in respect of which that public body can be considered rateable.

LITTLEDALE, J.—I am entirely of the same opinion. Under the original act of 1808, the commissioners were authorised to make a certain rate for the purpose of lighting the town of *Beverley*. Before the erection of their own works, they had to buy their gas from a private individual, who manufactured it. Now, however, they have bought premises, and have set up an establishment of their own for the manufacture of gas. By these means they are enabled to light the town at a much cheaper rate than before, and the consequence will be, a reduction of the rates imposed by them. All the persons then who, in consequence of the immunity from poor-rate enjoyed by the company, now pay an additional poor-rate, will thus have an equivalent given them to the extent of the reduction made in the charges for lighting and paving.

PATTESON, J.—The only point on which Mr. *Archbold* has attempted to distinguish this case at all from the *Liverpool* and other cases is, that in those instances the legislature has expressly said that the rates to be made shall be reduced from time to time, and that there is no such provision in this instance. But substantially there is such a provision. By the first act, a rate is to be made for so much as may be necessary to effectuate the purposes of that act, and there is no other fund which can be made auxiliary to those purposes. But the second act, by enabling the commissioners to take a gas apparatus of their own, and to let out gas to individuals for a profit, and by providing for the application of that profit to the purposes of the act, so that a lower rate will be sufficient for such purposes, does in substance apply the surplus to the reduction of the rate at first levied.

COLERIDGE, J. concurred.

Order of Sessions quashed (*a*).

(*a*) See *Rex* v. *York*, *ante*, 132.

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The KING *v.* The BIRMINGHAM and STAFFORDSHIRE Gas Light Company.

April 29.

By a local act guardians of the poor were directed to make a survey and valuation of all houses, lands, and hereditaments, and to assess the same to the poor-rate. A gas company having been rated for its gasometer, as a warehouse or building, at what it was worth to let by the year, although other occupiers were not rated in respect of steam-engines and other machinery affixed to their premises, for the purposes of manufacture, or for the increased value given to their premises by such machinery:—*Held*, that the rate was bad for inequality.

ON appeal against a survey and valuation, made by the guardians of the poor of the parish of *Birmingham*, and the churchwardens and overseers of the poor of the said parish, of all houses, lands, tenements, and hereditaments within the same, and the annual value thereof, for the purpose of rating them to the relief of the poor, the sessions confirmed the survey, subject to the following case:—

By 1 & 2 *Will.* 4, c. lxvii, "An Act for the better regulating the Poor within the parish of *Birmingham*," certain persons were appointed a corporation by the name of the guardians of the poor of the parish of *Birmingham*, and were authorised, together with the churchwardens and overseers of the same parish, from time to time to make a survey and valuation of all houses, lands, tenements, and hereditaments therein, for the purpose of rating them to the relief of the poor. An appeal was given to parties aggrieved. In *December*, 1833, a survey and valuation was made, in which the property of the appellants was thus described and valued:—

"*Birmingham and Staffordshire Gas Company.*

"For their gas-holders and premises in *Oxford Street*, and mains and pipes within the said parish, annual value, 2430*l.*"

The appellants were incorporated by an act of parliament, 6 *Geo.* 4, c. lxxix. In pursuance of this act, the appellants laid mains and pipes under the streets of the town of *Birmingham*, and have for many years supplied the town of *Birmingham* with gas by means of such mains and pipes. The whole of their gas is manufactured at *West Bromwich*, out of the parish of *Birmingham*, but conveyed into *Birmingham* by mains or pipeways. The appellants have no property whatever in the land in the streets in which their mains and pipes are laid, only a license to lay them from the commissioners under the *Birmingham Street* Act, in whom the soil is vested. The annual value of the appellants' gas-holders and premises in *Oxford Street*, and of their mains and pipes, was ascertained upon the following principle. The buildings in *Oxford Street*, and lands immediately connected with them, were valued as land and buildings at what they were worth to let by the year, in the same way as the value of other lands and buildings in the parish was ascertained. The gas-holder, which contains the gas when made, which is formed of brick and iron-work sunk several feet into the ground, and raised several feet above the surface of the ground, was valued as a warehouse or building, at what it was worth to let by the year. The mains and pipes and the land which they occupy were valued by ascertaining the quantity of land through which they were laid, and then valuing that land with reference to the value of the adjoining land, taking into consideration the purpose for which it is used. This value is an annual value to let for the purpose of a pipeway. The pipes and mains were separately valued at an annual rental to let, deducting an allowance of 20*l.* per cent. for wear and tear, in the same manner as the allowance for repairs in houses, the mains being considered as holders or depositaries from which the manufactured

article is delivered to the consumers. Many persons whose names were given in the notice of the grounds of the appeal, were, at the time of the making of the said survey or valuation, in the occupation of lands, houses, or buildings, to which pipes, steam-engines, and various other machinery, for carrying on the trades of the respective occupiers were affixed, being let into the ground, or otherwise attached to the freehold. If the steam-engines and machinery for the purpose of manufacturing, affixed to houses and buildings, ought to be estimated in the present rate, as forming part of the annual value of the houses and buildings, then the value of the houses and buildings would be increased beyond what they are rated at, as the annual value to let of the lands, houses, and buildings, mentioned in the notice of appeal along with the steam-engines and machinery, is in point of fact increased by the steam-engines and machinery attached to them. These pipes, steam-engines, and machinery, were omitted in the said survey or valuation, except as hereinafter mentioned. They were neither included in it specifically, as coming within the words "houses, lands, tenements, and hereditaments," nor indirectly, as adding to the annual value of the lands, houses, and buildings, to which they were so attached and affixed as aforesaid. The houses and buildings were valued at what they would be worth to let by the year, with a deduction of 20*l.* per cent. for repairs, reference being had to the purposes for which they were used, and to the additional strength and form of their construction, for the purpose of allowing steam-engines and other powerful machinery to be attached to them. The masonry and brick-work for boiler-seats and chimney-stacks are included, but the steam-engines themselves are not included. All machinery and apparatus used for the purpose of manufacturing, whether fixed or not, was intended to be, and is excluded from the survey or valuation. That was the principle on which it was made.

The questions for the Court of *King's Bench* were, first, whether the gas-holders, mains, and pipes of the appellants ought to have been included in the survey or valuation; secondly, whether the survey or valuation is not bad in law on account of such omissions as are mentioned in the case, or any of them; thirdly, whether, supposing that the pipes and mains of the appellants are rightly included, the principle upon which their annual value has been ascertained is a correct one.

If the Court should decide all these three points in favour of the respondents, then the said survey or valuation to be confirmed; if not, the same to be quashed or amended by the Court as far as the principle of the valuation might be affected.

M. D. Hill and *Amos*, in support of the order of sessions, first applied themselves to shew that the property of the appellants in question was rateable under the term "hereditaments," and for that purpose cited and commented upon the following cases: *Rex* v. *The Trustees for paving Shrewsbury* (*a*), *Rex* v. *Mayor, &c. of Bath* (*b*), *Rex* v. *Brighton Gas Company* (*c*), *Rex* v. *Chelsea Waterworks* (*d*), *Rex* v. *St. Nicholas, Gloucester* (*e*), *Rex* v. *Hogg* (*f*), *Rex* v. *Lord Granville* (*g*); but as the judgment of the Court was

(*a*) 3 B. & Ad. 216.
(*b*) 14 East, 609.
(*c*) 8 Dow. & Ry. 308.
(*d*) 5 Barn. & Adol. 156.
(*e*) Cald. 262.
(*f*) Cald. 266; 1 T. R. 721.
(*g*) 9 B. & C. 188.

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grounded wholly upon another point, the arguments thereon have been omitted. They then proceeded to argue that the fixed machinery belonging to the various occupiers mentioned in the notice of appeal was not rateable. The distinction between these pipes and mains and the fixed machinery, is, that the former have always been considered as land. They are a sort of warehouse or reservoir, employed, not for the purpose of manufacturing, but merely of storing away the gas when manufactured; *Rex* v. *Bath*, *Rex* v. *Rochdale* (*a*). The directions of the act itself, that the valuation, for the purpose of rating, is to be renewed at intervals of seven years only, affords an argument that it was never intended to rate machinery, which would seldom last for so long a period. The buildings themselves which contain the machinery are rated, and rated with reference to the purpose for which they are used. The masonry and brick-work for steam-boilers, for instance, are rated, and nothing is omitted but the machine itself, which would go to the executor and not to the heir; *Lawton* v. *Lawton* (*b*), and *Lord Dudley* v. *Lord Warde* (*c*). It is not therefore an hereditament according to the definition of that word in *Les termes de la ley*. It is true that in *Rex* v. *St. Dunstan's* (*d*) this Court held, that the value of fixtures in a demised tenement might be taken into account in estimating the value of that tenement, but the fixtures in that case were parcel of the freehold, and the judgment of the Court was founded on this circumstance.

Sir *W. W. Follett*, with whom was *Waddington*, *contrà*.—If the increased value communicated by machinery to the other premises mentioned in the notice of appeal ought to have been taken into consideration in the survey, the rate is bad for inequality. It is clear that a different principle has been acted on with regard to the property of the appellants and that of other individuals. Besides rating the gas-holder and the pipes, the guardians have rated the house of the appellants, according to the increased rate at which it would let, by reason of the gasometer, to a person to carry on the business of manufacturing gas. *Rex* v. *Liverpool* (*e*), and all the subsequent cases, decide that all buildings must be rated according to such increased value. *Rex* v. *Lord Granville* (*f*) differs in no respect from the present case. (He was then stopped by the Court.)

Lord DENMAN, C. J.—It is unnecessary to enter into the other points of the case; this rate is bad by reason of its omissions. It is expressly found that there are various buildings in *Birmingham*, to which machinery of various kinds is attached, and that they are not rated according to the increased value given to them by that machinery. It has long since been held, that any machinery rendering a building more valuable to its occupier, ought to be taken into consideration in the assessment of such building to the poors' rate. This doctrine has never been called in question.

LITTLEDALE, J., PATTESON, J., and COLERIDGE, J. concurred.

(*a*) 1 Maule & Sel. 634.
(*b*) 3 Atk. 13.
(*c*) Amb. 112.
(*d*) 4 B. & C. 686.
(*e*) 1 Ad. & Ell. 465.
(*f*) 9 B. & C. 188.

Hill then applied to the Court to amend the survey, but they were of opinion that they had no power to do more than lay down the principle upon which it should be amended.

Survey and rate sent back to sessions to be quashed or amended.

DUNN and others, Assignees of SHAW a Bankrupt, *v.* MASSEY and others.

April 17th.

The assignees of a bankrupt cannot, under 6 *G.* 4, c. 16, s. 70, acquire the legal estate in premises mortgaged by him, on tendering the mortgage money after the day fixed for its payment by the condition of the mortgage.

TROVER for title deeds belonging to the bankrupt. The first count stated a conversion before the bankruptcy; the second count a conversion afterwards. *Pleas:*—1st. Not guilty. 2d. That *Shaw* was not possessed at the time of his bankruptcy. 3d. That the assignees were not possessed. On the trial of the cause before Lord *Denman*, C. J. at the *London* sittings after last *Hilary* Term, it appeared, that in 1830 the bankrupt mortgaged certain premises, the title deeds of which were the subject of the present action, to a Mr. *Allen*, for 2000*l.* In *April*, 1832, he executed a second mortgage to one of the plaintiffs, *Dunn*, for a further sum of 2000*l.*; in *December*, 1833, a third mortgage of the same premises to the defendants, to whom he was then largely indebted. Shortly after this last mortgage he committed an act of bankruptcy, and a fiat issued against him in *February*, 1834. In the *March* following the defendants paid off *Allen*, the first mortgagee, who had received no notice from *Dunn*, and took an assignment of his mortgage to themselves. The plaintiffs contended that they were entitled to the deeds, on the ground that the last mortgage of *December*, 1833, was a fraudulent preference; and that the defendants had therefore only a lien upon the deeds for the mortgage money and interest paid by them to *Allen*, the repayment of which had been tendered by the plaintiffs. The jury found that the mortgage to the defendants had been executed by way of voluntary preference, but it was objected by the defendants that section 70 of the Bankrupt Act (*a*) did not entitle the assignees of a bankrupt to possession of his mortgaged estate, unless by tender of the mortgage money on or before the day appointed for its payment, which had not been done by the plaintiffs in this case; that the legal estate therefore was in *Allen*, or the defendants as his assignees. Lord *Denman*, C. J. being of this opinion, directed a verdict to be entered for the plaintiffs on the first issue, and for the defendants on the other two, reserving leave to the plaintiffs to move to enter a verdict on these issues also.

Sir *F. Pollock* now moved accordingly.—The object of the 70th section of the Bankrupt Act was to prevent the necessity of resorting to a Court of Equity, by giving assignees the privilege of paying money due upon mort-

(*a*) By 6 *Geo.* 4, c. 16, s. 70, "if any bankrupt shall have granted, conveyed, assured, or pledged any real or personal estate, or deposited any deeds, such grant, conveyance, assurance, pledge, or deposit, being upon condition or power of redemption at a future day, by payment of money or otherwise, the assignees may, *before the time* of such performance of such condition, make tender or payment of money, or other performance according to such condition, as fully as the bankrupt might have done, and after such tender, payment, or performance, may sell or dispose of such real or personal estate for the benefit of the creditors as aforesaid."

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gage at any time, whether before or after the stipulated day, and thereupon revesting the legal estate.

LITTLEDALE, J.—It appears to me that the legal estate is in the first mortgagee. By the usual provision in mortgage deeds, if the mortgagor, on or before a certain day, pay the money due and interest, the estate does not become absolutely vested in the mortgagee; but if he do not pay until afterwards, he must resort to a Court of Equity for relief. The object of section 70 of the Bankrupt Act, is to place his assignees in the same situation in which the bankrupt himself had been; and to give them the additional privilege of tendering the mortgage money before the day appointed, on which the estate is to revert to them. Here the day for payment had gone by before tender made, so that the legal estate remains in the first mortgagee. At all events no title has been shewn by the plaintiffs.

PATTESON, J.—Independently of the section relied upon, this action certainly could not be maintained. The time for performing the condition of the mortgage having elapsed, the assignees could not, by tendering the money due, have reinvested the mortgagor with the legal estate. The effect of the Bankrupt Act is to give the assignees power to anticipate the time of performance by their tender, and then to claim the estate; but no power to tender is given them after the time of performance has gone by.

Lord DENMAN, C. J. and COLERIDGE, J. concurred.

Rule refused.

COX *v.* PAINTER.

April 19th.

After the jury had been sworn in the cause, and the case on both sides closed, it was discovered that the issue on *Nisi Prius* record deviated from the form given in the rules of *H.* T. 4 *W.* 4, in not containing the date of the writ issued in commencement of the action:—*Held*, that the judge who tried the cause had authority to supply the omission.

TRESPASS. *Plea*, not guilty. At the trial before *Parke*, B., at the last *Berkshire* Assizes, after the case had been closed on both sides, it was observed by the learned baron, that the issue on the *Nisi Prius* record did not contain the date of the writ of summons, and that it did not therefore appear but that the action had been commenced before the commission of the alleged trespass. The writ, which was properly dated, was then put in by the plaintiff, at the suggestion of the learned baron, who amended the record by insertion of the date, saying, that he had once before allowed a similar amendment to be made at *Liverpool*. He gave leave, however, to the defendant to move to enter a nonsuit, if the Court should be of opinion that the amendment ought not to have been allowed.

J. J. Williams, now moved accordingly.—The record was defective in not containing the date of the writ agreeably to the form given by the rules of *H.* T. 4 *Will.* 4. It has been decided, that the issue must follow the form given by the new rules, *Ball* v. *Hamlet* (*a*). Under the 3 & 4 *Will.* 4, c. 42, s. 23, the judge is empowered merely to amend variances, but not to supply omissions, in the record. In *John* v. *Currie* (*b*), *Parke*, B. held, that an omission in the record could not be supplied at the trial. No doubt a false date

(*a*) 1 Crom. Mees. & Rosc. 575. (*b*) 6 Carr. & Pay. 618.

might be corrected; but in this case the record gave no date at all to the writ of summons.—[*Littledale*, J.—The heading to the forms given by the rules cited, contains the proviso, "that in case of non-compliance the Court or judge may give leave to amend." My only doubt is, whether this proviso applies when the jury has been sworn.]—That proviso was not considered sufficient to authorise the learned baron to supply the omission in *John* v. *Currie*.

PATTESON, J.—That was a very different sort of omission, namely, of a material averment in the plea. In trespass for taking "mirrors and handkerchiefs," the defendant justified the taking of the mirrors, but omitted to justify the taking of the handkerchiefs.

Lord DENMAN, C. J.—It is immaterial whether the learned baron was empowered by the statute to make the amendment. The rule of *H.* T., which prescribes the form of the record, does itself give the judge power to amend in cases of non-compliance, which will include cases of omission as well as cases of variance. *John* v. *Currie* is a very different case, and in that case there was nothing to amend by. Here the writ of summons was produced, and shewed that the action had been commenced in proper time.

LITTLEDALE, PATTESON, and COLERIDGE, Js. concurred.

Rule refused.

TOMLINSON *v.* GELL.

April 25th.

Where an agreement was entered into between a defendant in a *Chancery* suit, and the plaintiff's solicitor, with the consent of the plaintiff, that in consideration of the suit being discontinued, the defendant should pay to the solicitor the plaintiff's bill of costs:—*Held*, as the plaintiff had not been released, that this was an agreement by defendant to pay the debt of another, within sect. 4 of the Stat. of Frauds, and ought to have been reduced to writing.

DECLARATION stated, that a suit in *Chancery* had been commenced against the defendant, by one *William Buxton* and *Anne* his wife, to compel an account, and that the plaintiff had been retained and employed as the solicitor for the said *William Buxton* and *Anne* his wife; that certain costs and charges had become due to said plaintiff as such solicitor in the course of the said suit, to wit, to the amount of 30*l.*; that plaintiff was about to prosecute the said suit on behalf of *William Buxton* and *Anne* his wife, for recovery of the sums claimed by them, and of the costs and charges incurred in the course of the suit; that thereupon, in consideration of the premises, and for the purpose of putting an end to all disputes between *William Buxton* and *Anne* his wife and the said defendants, it was agreed between the plaintiff and the defendant, with the consent of *William Buxton* and *Anne* his wife, that all further proceedings in the suit should be discontinued, and that the defendant should pay to the plaintiff the costs and charges which had become due and payable to the plaintiff, as such solicitor; that in consideration that plaintiff had agreed to receive from defendant the costs and charges so incurred, in order to put an end to the suit, defendant promised to pay said costs and charges. *Averment*, that suit had been discontinued. *Breach*, that defendant had not paid said 30*l.*, and that plaintiff had been hindered from recovering the costs and charges so incurred by and payable to him, as he otherwise might have done, if said suit had not been discontinued at the request of the defendant. Fourth *Plea*, that said supposed promise and

undertaking of said defendant, was a special promise to answer for the debt of another person, and that there was not nor is any memorandum or note in writing of said promise, and of the consideration thereof, as required by the statute in that behalf made and provided, and this he is ready to verify.

Special Demurrer, for that the said plea is not sufficient in law, and for causes of demurrer in law to the said plea the plaintiff says, that it does not appear by the declaration, or by the said plea, that the promise in the declaration mentioned was a special promise to answer for the debt of another person, nor is it stated from whom the said debt is due; and it appears from the declaration that the plaintiff was about to prosecute the said suit therein mentioned against the defendant, for the recovery from the defendant of the costs and charges in the declaration mentioned, and that the promise of the defendant was made on a new consideration moving to the defendant, and was not a promise to pay the debt of any other person, &c.

Kelly, in support of the demurrer.—This is not a case of a promise to answer for the debt of another, within the meaning of the fourth section of the Statute of Frauds; but of a promise founded upon a new and distinct consideration moving to the defendant himself. The plaintiff had been employed by *Buxton* as his solicitor in a suit in *Chancery* instituted against the defendant. In the progress of that suit certain costs had been incurred, for which the defendant would be liable in the event of a decree passing against him. At this stage of the proceedings, the three parties meet—the present plaintiff, the plaintiff in the *Chancery* suit, and the present defendant. Each of the two former gave up some right to the defendant as a consideration for his promise; the plaintiff in the suit gave up his right to go on for the enforcement of his claim, and the solicitor gave up both his demand against *Buxton* personally, and his lien on the suit, for the costs incurred. This then is a direct promise made by the defendant on his own account, and not a collateral promise on account of another person, and clearly within the principle laid down in *Williams* v. *Leper* (*a*). In that case the defendant was employed as a broker, to sell the goods of a tenant under a bill of sale given by him to his creditors. The tenant's rent was in arrear, and the broker undertook to pay it if the landlord would desist from distraining. This was held not to be a case within the statute.—[*Coleridge*, J.—Does not *Buxton's* liability to the plaintiff continue? Has it been released?]—It does not appear; but the same objection, it is submitted, would apply in *Williams* v. *Leper* (*a*).—[*Coleridge*, J.—No; the decision in that case turns upon the circumstance that the goods of the tenant were the debtor, being the fund on which the landlord had a lien, and that after the goods had been sold, the money, or part of it, was the landlord's, in the hands of *Leper* as his bailiff, on which money had and received might have been brought.]—[*Patteson*, J.—Whether there was a new consideration or not, is only part of the question. There might be a new consideration, and yet the promise notwithstanding be a promise to answer for the debt of another. The nature of the consideration does not alter the nature of the promise, unless as in *Goodman* v. *Chase* (*b*), where a debtor had been taken in execution, and in consideration of his being discharged out of custody, the defendant promised to pay the debt. There,

(*a*) 3 Burr. 1886. (*b*) 1 Barn. & Ald. 297.

as soon as the debtor was discharged, the original debt was extinguished, and so the defendant's promise could not be considered collateral.]—*Bampton* v. *Paulin* (*a*), which confirms *Williams* v. *Leper*, and *Lilley* v. *Hays* (*b*), are in favour of the plaintiff. Here it may also be contended, that there never was any debt due by a third person. Nothing would be due for costs from any one, until the termination of the suit. The liability for the bill of costs took its origin from this agreement, and was the original liability of the defendant himself.

Platt, contrà.—*Buxton* is still liable to the plaintiff; the promise is clearly therefore to answer for the debt of another. If *Buxton* were released, this case might then resemble *Williams* v. *Leper*. (He was here stopped.)

Lord DENMAN, C. J.—It may be doubtful whether there has been any consideration for the promise in this case; it does not appear very distinctly either that the plaintiff relinquished, or that the defendant gained, any advantage by entering into this agreement. At all events, whether there was any consideration for it or not, this is a promise of a collateral nature to satisfy the debt of another person; for the plaintiff's claim against his clients the *Buxtons*, does, for any thing that is shewn to the contrary, subsist in all its validity at the present moment. The parties to the *Chancery* suit agree that it shall be discontinued, and the defendant, for some reason or another, good or bad, undertakes himself to pay the bill of costs due by the plaintiff in that suit, to the plaintiff in this action. I think, therefore, that the plea furnishes a good answer to the declaration.

LITTLEDALE, J.—I am of the same opinion. It appears that there was a suit in *Chancery*, which the parties to it agreed should be put an end to. The terms of the arrangement were in substance, that the plaintiff in the suit should be paid his costs by the defendant; and if the plaintiff in the suit had brought an action against the defendant, alleging that, in consideration of his having discontinued proceedings, the defendant had promised to pay him his costs, no doubt there would have been a good consideration. The attorney certainly was in point of form a party concerned in this arrangement; for as it could make no difference, whether the costs were first paid to *Buxton*, and by *Buxton* handed over to the attorney, or whether they were paid to the attorney in the first instance, the defendant made a promise to pay them at once to the attorney. Here, however, the well-known rule of law steps in, which requires that such a promise should be in writing. The debt undoubtedly was the debt of a third person. The defendant was under no liability for the costs in question; *Buxton* alone was liable, and still continues so.

PATTESON, J.—The question raised is, whether or not there has been an undertaking in this case to pay the debt of a third person, within the meaning of the Statute of Frauds. It is quite clear that the debt originally was the debt of another person, and that the attorney of the plaintiff in the suit had no right against the defendant for the costs of that suit. There is nothing in

(*a*) 4 Bing. 264. (*b*) 1 Nev. & Per. 26.

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this declaration to shew that the present plaintiff has given up his claim against his own client, *Buxton*. That claim, therefore, is still in force. Mr. *Kelly* says, however, that a new consideration has intervened, the effect of which is to make this an original promise. In some cases the consideration has had that effect, but it is otherwise in this instance. The cases I allude to are, where the plaintiff having acquired something more than the original claim, something more than the right of suing his own debtor, as a lien by distraining goods in the hands of the defendant, has given up that advantage to the defendant (*a*). In *Goodman* v. *Chace* (*b*), the discharge of the original debtor out of custody, which formed the consideration, affected the promise itself, by extinguishing the debt of the third person, so that the promise could not be collateral.

COLERIDGE, J.—It is unnecessary to say whether the consideration in this case would have been sufficient, if there had been any written memorandum of the agreement, because the question is, what is the promise? Is it a promise to pay the debt of a third person? I was at first struck with Mr. *Kelly's* argument, that the liability to pay costs took its origin altogether from this agreement, that in fact there had never been any liability at all on the part of *Buxton*. That argument ceased to have any weight, when I referred to the declaration, which states that the plaintiff had been employed by *Buxton*, and that the costs had become due and payable in the course of the suit. Has the debt there spoken of been discharged? It is still subsisting, and the defendant's engagement is for the subsisting debt of a third person.

Judgment for defendant (*c*).

(*a*) As in *Williams* v. *Leper*, and *Edwards* v. *Kelly*, 6 M. & S. 204.

(*b*) 1 Barn. & Ald. 297.

(*c*) For a luminous exposition for the law on the subject of this case, see note *i*, 211 b, to *Forth* v. *Stanton*, in Wms. Saund 5th ed.

SPENCER *v.* NEWTON.

April 28th.

THE defendant in person, on a former day in this term, had obtained a rule *nisi* for setting aside the writ of *capias* in this case, and all the subsequent proceedings, on the ground of the insufficiency of the affidavit of debt, and also for setting aside all proceedings subsequent to the writ for irregularity in the service of the declaration. The defendant was arrested on the 16th of *January*. The affidavit of debt was in the following words:—"*John Harvey*, of *Ripon*, in the county of *York*, manager of the

1. The following affidavit of debt, "*J. H.* of, &c, manager of the *Ripon* branch of the *Yorkshire* district bank, maketh oath and saith, that *A. N.* is justly indebted unto *J. S.* of, &c., *as one of the registered public officers of the said Yorkshire district bank*, for money lent by this deponent, as such manager as aforesaid, to the said *A. N.*," is irregular, in not shewing the bank to be within the provisions of the act (7 *G.* 4, c. 46, s. 9,) for the regulation of copartnership banks, but is not a nullity.

2. Defendant having been arrested on 16th of *January*, applied to the Court to be discharged on the ground of privilege. He afterwards, on the 3d of *February*, applied for his discharge on the ground of irregularity in the affidavit of debt:—*Held*, as it did not appear by affidavit when this irregularity first became known to him, that he was too late to take advantage of it.

3. Where a defendant is in custody, delivery of a declaration to an attorney for him is irregular, although the attorney may have attended summonses at chambers for him in the course of the action.

Ripon Branch of the *Yorkshire* District Bank, maketh oath and saith, that *A. N.* is justly and truly indebted to *J. Spencer*, of *Plantation*, in the county of the city of *York*, Esq., as one of the registered public officers of the said *Yorkshire* District Bank, in the sum of 50*l.* for money lent by this deponent, as such manager as aforesaid, to the said *A. N.*, at his request." On his arrest, the defendant obtained a rule *nisi* for his discharge on the ground of privilege. Cause was shewn on the last day of *Hilary* term, and the rule discharged (*a*). No objection was taken to the above affidavit until the 3d of *February*, when the defendant took out a summons before *Patteson*, J. to be discharged out of custody, on the ground that the affidavit was insufficient; but the learned judge conceiving it to be sufficient, refused the order. On the 16th of *February* a declaration in the cause was delivered to an attorney, who had attended several summonses for the defendant at chambers, and a rule to plead was given. A summons was taken out before *Coleridge*, J. to set aside this rule, on the ground that the delivery of the declaration to the attorney was irregular. The learned judge, however, refused to interfere, and judgment was signed for want of a plea.

Sir *F. Pollock*, and *Barstow*, now shewed cause.—No objection was made to the affidavit when the defendant was before the Court on a former occasion, and the present objection is too late. But the affidavit is sufficient. It contains the deposition of the manager of a bank established under 7 *Geo.* 4, c. 46 (*b*), that the defendant is indebted to the plaintiff as one of its registered public officers.—[Lord *Denman*, C. J.—What right has the plaintiff to sue in such a character? The affidavit gives us no information concerning the bank itself, so as to shew it to be a bank within the statute.]—It is difficult, perhaps, to define to what degree of particularity the affidavit should proceed, but it may be easily collected from the present statement, that the *Ripon* bank is a bank registered under the statute. The defendant could not be misled; for the names of the bank, of all its partners, and of its public officers, must be returned to the Stamp Office, according to the schedule given by the act. Another objection made by the defendant to the proceedings is, that the declaration has been delivered to the attorney, instead of to himself or to the turnkey. This may be a valid objection in some cases, according to *Dent* v. *Halifax* (*c*), where an attorney has been employed for a limited purpose only, as to put in bail; but cannot be allowed in such a case as this, where summons after summons has been attended by the defendant's attorney.—[*Patteson*, J.—The business at chambers could only be attended by attorney. It does not, therefore, appear that any attorney had been appointed to act in the cause generally for the defendant.]

(*a*) *Vide ante*, p. 122.

(*b*) "An Act for the better regulating of Copartnerships of certain Bankers in *England*." Sect. 9 enacts, "That all actions and suits, and also all petitions to found any commission of bankruptcy against any person or persons, who may be at any time indebted to any such copartnership carrying on business under the provisions of this act, and all proceedings at law or in equity under any commission of bankruptcy, and all other proceedings at law or in equity, to be commenced or instituted for or on behalf of any such copartnership, &c., for recovering any debts or enforcing any claims or demands due to such copartnership, or for any other matter relating to the concerns of such copartnership, shall and lawfully may, from and after the passing of this act, be commenced or instituted and prosecuted in the name of any one of the public officers nominated as aforesaid for the time being of such copartnership, as the nominal plaintiff or petitioner for and on behalf of such copartnership, &c. &c."

(*c*) 1 Taunt. 493.

Defendant in person, in support of the rule, contended, that as he had not become aware of the defect in the affidavit until the 3d of *February*, when he applied to *Patteson*, J. at chambers, there had been no waiver on his part. He then contended that the defect was not merely an irregularity but a nullity, so that his objection might be entertained at any time. (He was then told by the Court that he need not argue the point as to the service of the declaration.)

Lord DENMAN, C. J.—We are all of opinion that the declaration has been irregularly served, and that there has been no waiver of the irregularity. The application in this case is, first, to set aside all proceedings whatever in the action by reason of the affidavit of debt being a nullity; in the second place, to set aside all proceedings subsequent to the arrest, because the service of the declaration is bad. In the first place, I do not think this affidavit is a nullity, although it is certainly defective. There is a difficulty perhaps in seeing how the plaintiff is in law connected with the bank, and the bank with the statute, but still enough is shewn to induce us to say that this affidavit is not altogether a nullity. Then the question is, whether the defect, being an irregularity only, has been waived. It seems that an application was made to this Court (*a*) to discharge the plaintiff out of custody, because, at the time of arrest, he was privileged in consequence of his having to attend before an arbitrator. The defendant now states, in the course of his argument, that on the former occasion he confined himself to the question of privilege, because he was not then aware of the defect in the affidavit. This circumstance, however, is not stated in his affidavit in support of the present rule, and we think it ought to have appeared distinctly on affidavit at what time he first became cognisant of this defect. As it does not so appear, the right of objecting to that defect has been waived. With regard to the irregularity in the service of the declaration, we think, as the matter was brought before my brother *Coleridge* at chambers, that the defendant is now in time to take advantage of it, and that the declaration and all subsequent proceedings must be set aside.

PATTESON, J.—With respect to the affidavit, it seems, that when it was mentioned before me at chambers, I considered it to be sufficient. On further consideration, I think I was wrong, and that this affidavit, although not a mere nullity, is insufficient. If, therefore, the application then made to me was in time, this application to the Court must also be considered as made in time; because it is but the following up of the application previously made to me. But the defendant has not informed the Court in his affidavit when he first knew of the irregularity in the affidavit of debt. It seems to me, therefore, that not having accounted for the delay which occurred before the subject was introduced at chambers, he is not at present in a position to take advantage of this irregularity. Upon the other point, namely, the delivery of the declaration, I have no doubt. I do not think that where a defendant is in custody, there can be in any case whatever, except at his own desire, or under some special agreement, a good delivery of a declaration to

(*a*) *Antè*, p. 122.

the attorney. The rule is, that it shall be served upon the prisoner or the turnkey.

COLERIDGE, J. concurred.

Rule absolute for setting aside the declaration, and all subsequent proceedings: rule discharged as to the rest.

LAW and another *v.* WILKINS.

May 4th.

The defendant's son, a boy at school, being in want of clothes, had them supplied to his own order just before the holidays. He then took them home with him in his box, and brought them back again to school after the holidays: —*Held*, that there was evidence of an implied contract by the father sufficient to be left to the jury.

ASSUMPSIT for the price of a suit of clothes, furnished by the plaintiffs to the son of the defendant. *Plea, non assumpsit.* On the trial before *Parke*, B. at the *Cambridgeshire* Summer Assizes, 1835, it appeared that the clothes had been ordered by the son himself, while at school at *Cambridge*, twenty miles from the place of his father's residence. They were sent to him on the 29th of *May*, and were taken with him in his box on the 2d of *June* following, when he went home for the holidays, and brought back with him on his return to school. There was no evidence that the father had ever seen them. The learned baron, on the authority of *Blackburn* v. *Mackey* (*a*), considered that no contract could be implied against the defendant, and directed a nonsuit. *Kelly* having, on the authority of *Baker* v. *Keene* (*b*), obtained a rule *nisi* to set aside the nonsuit and for a new trial,

Storks, Serjt., now shewed cause.—The nonsuit was right. The plaintiff should have proved either an express authority from the defendant, or so strong an implied authority as to be equivalent. Neither the boy himself nor the schoolmaster had any right to order the clothes. If clothes were wanted the defendant should have been written to.—[Lord *Denman*, C. J. mentioned *Rolfe* v. *Abbott* (*c*).]—There was no evidence that the defendant ever saw the clothes or heard that they had been furnished.

Kelly, contrà, was not heard.

Lord DENMAN, C. J.—It seems to me that the learned baron was not warranted by any decided case in directing a nonsuit. A father, speaking generally, is liable to those who supply his child with necessaries. The boy wanted clothes, and there was no evidence that either the schoolmaster or any other person was authorised to provide for their supply. I do not think that the tradesman in this case has been guilty of any impropriety. Suppose a boy were not placed under the care of a schoolmaster, but sent out into the world to work for his living, there would then be no person whose duty it would be to write to the father. In this instance the plaintiff appears to have known nothing of the boy, except that he was in a situation in which he ought to be properly clothed, and that he was not properly clothed.

LITTLEDALE, J. concurred.

(*a*) 1 Car. & Payne, 1.
(*b*) 2 Stark. 501.
(*c*) 6 Car. & Payne, 286; see also *Fluck* v. *Tollemache*, 1 Car. & Payne, 5.

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PATTESON, J.—I think there was some evidence to shew the father knew that the boy had these clothes. They were supplied on the 29th of *May*, taken home by the boy on the 2d of *June*, and brought back by him after the holidays. Is it to be supposed that he kept them shut up in a box all the holidays, and that his father never saw them? I do not think that this is the effect of the evidence. The question should have been left to the jury.

COLERIDGE, J.—The boy procured the clothes when at school, and immediately after went home to his father. We are desired to infer that he kept them shut up in his box, and took care that his father should never see them. There was abundant evidence to prove that the father might have seen them.

Rule absolute.

DOE *d.* JAMES THOMPSON *v.* SUSANNAH THOMPSON.

May 4th.

Where a tenant at will, having kept possession of land without acknowledgment for upwards of twenty years, died before the passing of the 3 & 4 *W.* 4, c. 27, (the Limitation Act):—*Held*, that section 7 did not give his heir at law title to maintain ejectment against a third person within the five years after the passing of the act, allowed to the real owner by s. 15.

EJECTMENT before *Parke*, B. at the *Cambridgeshire* Summer Assizes, 1835. Possession of the premises in question had been given by the grandfather to *James*, the father of the lessor of the plaintiff, in 1807. *James*, the father, occupied until 1831, without payment of rent, and then died. His widow then entered, against whom the present action was brought by *James*, the son, as his heir-at-law. The jury found that the possession by *James*, the father, for twenty years and upwards, had not been adverse possession; but the plaintiff contended, even if the possession had been continued by the father as tenant at will, yet that such a possession, at the expiration of one year after its commencement, was by the 3 & 4 *Will.* 4, c. 27, s. 7, tantamount to an adverse possession. The learned baron thereupon directed the verdict to be entered for the defendant, but gave leave to move the Court to set this aside and enter the verdict for the plaintiff.

B. Andrews, having obtained a rule *nisi* for this purpose,

Kelly (with whom was *Byles*) shewed cause.—The 7th section of 3 & 4 *W.* 4, c. 27, is relied upon by the plaintiff. That section provides, that when any person shall be in possession of land as tenant at will, the right of the person entitled, subject thereto, shall be deemed to have first accrued either at the determination of such tenancy, or *at the expiration of one year next after the commencement of the tenancy, at which time such tenancy shall be deemed to have been determined.* This section, taken by itself, will not bear out the claim of the plaintiff, because it cannot apply to such tenancies at will as had been determined before the act passed. The tenancy in this case was at an end on the death of *James*, the father, in 1831. But section 15, which provides, that where possession is not adverse at the time of the passing of the act, the right of the person entitled shall not be barred until the end of five years after the passing of the act, is, at all events, decisive against the claim.

B. Andrews, contrà.—There is nothing in the act to withdraw its operation from by-gone transactions. Section 7 gave to the possession of the father

all the incidents of adverse possession. The plaintiff then, his heir, would have an indefeasible title but for the qualification in section 15, which allows the real owner five years more after the passing of the act.—[*Coleridge*, J.—You admit that the devisees of the grandfather would have a superior claim to the plaintiff, but say that no one else can set up that title.]—That is so. The title of a person in the situation of the plaintiff is subject to the reservation in section 15, which is specially made in favour of the real owner, but as against every body else his title is indefeasible.—[*Patteson*, J.—You are not defendant. If you were, there might be something in the argument. Besides, the act does not apply where the possession was at an end before it passed.]

Lord DENMAN, C. J.—The monstrous consequences which would flow from the construction contended for, are enough to shew it to be incorrect. If it be the right construction, where any person before the passing of the statute has held land for twenty-one years without accounting for the rents and profits, his heir-at-law may say the statute has at once cast the title upon him, and turn out the party in possession.

LITTLEDALE, J. concurred.

PATTESON, J.—The case would have been very different if the present claimant had been tenant at will upwards of twenty years, and in possession at the time of the passing of the act. The 7th section would then apply, and the real owner could only dispossess him by bringing in aid the additional five years allowed by the fifteenth section. But in this case the claimant, as lessor of the plaintiff, is bound to make out his own title, which he has not made out, by shewing that his father was once in possession for twenty years. There was an end of the father's estate long before the passing of the act, and yet it is said, that by the passing of that act a fee simple is to arise to his heir.

COLERIDGE, J. concurred.

Rule discharged.

REX *v.* HARRIS.

April 17th.

The Court refused a rule *nisi* for a *quo warranto* which was applied for by a private relator against a town clerk no longer in office, for the purpose of trying his right to compensation for loss of office under the Municipal Corporation Act, (5 & 6 *W.* 4, c. 76, s. 66.)

STARKIE applied for a rule to shew cause why an information in the nature of a *quo warranto* should not be filed against the defendant, to know by what authority he had exercised the office of town clerk of *Cambridge*. The defendant had been elected town clerk in 1833, and continued in office until 1836, when the Municipal Corporation Act (5 & 6 *Will.* 4, c. 76,) came into force, and another person was appointed in his room. He then preferred his claim, under section 66 of that act, to compensation for loss of office; and the object of this application, which was made by a private relator, was to defeat that claim by shewing that the defendant had never legally occupied the office, inasmuch as he had not, on his admission to it, either taken the oaths of supremacy and allegiance, according to 25 *Car.* 2, c. 2, or subscribed the declaration not to injure the established

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church, as required by 9 *Geo.* 4, c. 17, s. 2.—[Lord *Denman*, C. J.—Is it not enough to entitle him to compensation under the Municipal Act, that he was *de facto* in office? Is his title to the office now material?]—He was not in office at all; by sect. 4 of the 9 *Geo.* 4, c. 17, his non-compliance with the requirements of that statute rendered his election void. The Annual Indemnity Act (*a*) will not avail the defendant, for it provides that persons who comply within a certain period shall be recapacitated, and therefore refers to persons who may be still in office. In this case not only has the period allowed gone by, but the office has been filled up by another. Judgment against the defendant on *quo warranto* under these circumstances would be of *ouster* absolute, and not merely of *ouster quousque; Rex* v. *Reeks* (*b*), *Rex* v. *Pindar* (*c*), and *Rex* v. *Courtney* (*d*), which are authorities against the doubt on this point in *Rex* v. *Clarke* (*e*).

Per Curiam (*f*).—There is no ground for this application. The object of it is not to try the defendant's title to office, and to remove him if he should appear to have no title, for he has been removed long since; but indirectly to ascertain the validity of his claim to compensation under the Municipal Act. If the objections to the defendant's admission would furnish any answer to that claim, the corporation may refuse to compensate him, and then they will be regularly considered. In some instances this Court has granted informations, even at the instance of a private relator, against persons after they have gone out of office, as in *Rex* v. *New Radnor* (*g*); but only when some civil right, as the validity of the election of other members of a corporation, has depended upon their title. Here there is no such reason for our interference.

Rule refused (*h*).

(*a*) See 9 *G.* 4, c. 6.
(*b*) 2 Ld. Raym. 1447.
(*c*) 1 Stra. 582, by the name of *The case of The Mayor of Penryn.*
(*d*) 9 East, 246.
(*e*) 2 East, 75.
(*f*) Lord *Denman*, C. J., *Littledale*, *Patteson*, and *Coleridge*, Js.
(*g*) 2 Lord Ken. 498.
(*h*) See 9 *Anne*, c. 20.

TAYLOR and others *v.* WILKINSON and another.

April 22d.

Where after bail has been put in to an action the declaration is amended by the insertion of new counts upon distinct causes of action, and the plaintiff succeeds both upon the original and added counts, the bail are not liable for the general costs of the declaration, but of the original counts only; and it is the duty of the plaintiff on taxation to have such costs separately assessed.

AN action by original was brought in 1812 by the present plaintiffs against one *Gregory*. The present defendants became his bail. The declaration (*i*) contained counts corresponding to the writ, which was by original, but was afterwards amended by the introduction of additional counts for new causes of action, and by increasing the sum demanded in each count, and the amount at which the damages were laid in the declaration. A verdict was afterwards obtained for the plaintiffs. The damages were separately assessed on the different counts, but the costs had been taxed and judgment entered up for the costs generally upon the whole declaration. To *scire facias*, afterwards brought against the defendants as bail, for non-payment of the damages assessed on the original counts, and of the general costs of the action, they

(*i*) See the case 1 Har. & Wol. 451.

demurred, on the ground that the amendments in the declaration rendered the action no longer identical with that in which they had become bound, and that they were therefore entirely discharged from all liability. The Court, however, was of opinion that, whatever relief might be afforded them on special application, they were not wholly discharged, and judgment was given for the plaintiffs. In this term a rule was granted, calling upon the plaintiffs to shew cause why they should not be restrained from issuing execution against the defendants for more than the sum for which bail had been given, and the amount of the costs in the action on the *scire facias*.

Sir *W. W. Follett* shewed cause.—The question is, whether the bail are liable for the costs of the original action against *Gregory*. It may be conceded that they would not be so liable if the plaintiffs had failed to recover upon the original counts in the declaration; but it is otherwise when the plaintiff succeeds upon the original as well as the added counts. In *Wheelright* v. *Sutting* (*a*), the bail were relieved from their responsibility; but in that case no evidence at all was given by the plaintiff on the only original count, which was upon a bill of exchange. Even if it be considered reasonable that the bail should be amenable to the costs of those causes of action only, which were made known to them on their entering into their engagement, there is no ground for their present application to be discharged from the whole costs; the defendants should themselves have severed the costs, or have come to this Court to enable them to do so.

Sir *J. Campbell*, A. G., in support of the rule.—It is not contended that the bail are liable for the damages assessed on the added counts in the declaration. How then can it be reasonable that they should be liable for the costs on those counts? Suppose a defendant arrested for the amount of a bill of exchange: he procures bail, and the plaintiff then inserts in his declaration counts upon the warranty of a horse, or upon a policy of insurance. The costs of the count upon the bill might be only 20*l.*, and the other costs amount to 500*l.* In such a case would it be just to extend the undertaking of the bail to the whole costs. But it is said the defendants should have procured a separate assessment of the costs—a duty which clearly devolved upon the plaintiffs.

Per Curiam (*b*).—The plaintiffs have given judgment against themselves in this matter; they procured a separate assessment of the damages, and should have also procured a separate assessment of costs. The defendants ought to be liable for the costs of those causes of action only, which were known to them when they entered into their recognisance. The *onus* of separating the costs lay upon the plaintiffs and not upon the bail, who had no opportunity of attending before the Master on the taxation of costs in the original action.

Rule absolute.

(*a*) 7 Taunt. 304. (*b*) Lord *Denman*, C. J., *Littledale*, *Patteson*, and *Coleridge*, Js.

King's Bench.

April 19*th.*

Where a broker on a sale of goods received the purchase money, and delivered an invoice in his own name:—*Held*, in an action against him for their non-delivery, that the form of the invoice precluded him from setting up the defence, that he was a mere agent, and that his principal was known to the plaintiff.

JONES *v.* LITTLEDALE.

ASSUMPSIT for not delivering a quantity of hemp, for money had and received, and on an account stated. *Non-assumpsit* was the only material plea. At the trial before *Patteson*, J. at the last *Liverpool* Assizes, it appeared that the plaintiff had bought the hemp by auction, at the rooms of the defendants, who were brokers in that city, and the following invoice was produced:—

"*Liverpool, Oct.* 2, 1836.

"*Jones* bought of *Littledale* and Comp., sixty-four bales of hemp, &c. &c. Payment, fourteen days and six months."

There was an indorsement of the receipt of the purchase-money, signed by the clerk of the defendants, who gave the plaintiff a delivery order upon Messrs. *Coupland* and *Duncan*, at whose warehouse the hemp was. Messrs. *Coupland* and *Duncan* having refused to deliver the hemp, plaintiff's son saw one of the defendants on the subject, who said he would procure the delivery, but never did. The counsel for the defendants opened in answer, that he was ready to prove that the hemp was advertised for sale in two mercantile papers circulating in *Liverpool;* that the advertisement contained a reference to *Coupland* and *Duncan* as the merchants, and sufficient notification that the defendants were brokers only; that in the conditions of sale, the defendants were expressly described as the brokers of the seller, whose name, however, was not therein mentioned; that the defendants had lent money to *Coupland* and *Duncan* on account of this hemp, and that it was the custom, under such circumstances, for brokers to make out the invoice in their own name, merely that the purchase-money might pass through their hands; that a fiat of bankruptcy issued against *Coupland* and *Duncan* on the 25th of *November*. The learned judge being of opinion that the facts opened for the defendants were no answer to the action, directed a verdict for the plaintiff.

Cur. adv. vult.

Cresswell, on a former day in this term, moved for a new trial, on the ground of misdirection.—Where a person is known to contract as an agent, he is not liable, unless his principal be unknown. An invoice delivered subsequently to the contract by the broker, in his own name, cannot alter the contract. Parol evidence may be given, as in *Moore* v. *Clementson* (*a*), to shew to whom goods really belong, notwithstanding the bill of parcels. Had the evidence offered for the defence been admitted, it would have appeared that the defendant had made advances to his principals, and had received payment with their sanction, so that the payment was made virtually to the principals.—[*Patteson*, J.—In your view of the case, what was the use of a delivery order from the defendants? Why did not the plaintiff go at once to *Coupland* and *Duncan* for the delivery?]—The delivery order was necessary to shew that the payment had been made, as in *Warner* v. *Mackay* (*b*). Parol evidence may be given, notwithstanding the invoice, to exonerate a person named in it, as well as to charge a person not named in it.

(*a*) 2 Campb. 24. (*b*) 1 Mees. & Wels. 591.

Lord DENMAN, C. J., on a subsequent day (after stating the facts), gave the judgment of the Court.—There is no doubt that evidence is admissible on behalf of one of the contracting parties, to shew that the other was agent only, though contracting in his own name, and so to fix the real principal; but it is clear, that if the agent contracts in such a form as to make himself personally responsible, he cannot afterwards, whether his principals were or were not known at the time of the contract, relieve himself from that responsibility. In this case there is no contract signed by the sellers, so as to satisfy the Statute of Frauds, until the invoice, by which the defendants represent themselves to be the sellers, and we think that they are exclusively bound by that representation. Their object in so representing was, as appeared by the evidence of custom, to secure the passing of the money through their hands, and to prevent its being paid to their principals; but in so doing they have made themselves responsible, and we think it impossible to read the invoice in the sense proposed.

Rule refused.

The KING *v.* The Inhabitants of KIMBOLTON.

April 26th.

ON appeal against an order of justices, for the removal of a pauper from the parish of *Kimbolton*, in the county of *Hereford*, to the borough of *Leominster*, in the same county, the sessions adjourned the appeal, subject to the opinion of this Court upon the following case.

When the appeal was called on, the appellants proved that notice of appeal was served upon the churchwardens and overseers of *Kimbolton*, on the 10th of *September*, 1835, and that on the 3d of *October* following the attorney for the appellants served a statement of the grounds of appeal, signed by the churchwardens and overseers of *Leominster*, upon an attorney of the name of *Dipple*, as the attorney of the churchwardens and overseers of *Kimbolton*, who accepted the same on their behalf. It was objected by the counsel for the respondents, that assuming that Mr. *Dipple* was actually the attorney employed by the respondents in this appeal, which the respondents said they were able to disprove, still the service of such statement of the grounds of appeal was insufficient, as the statement was not served upon the overseers themselves, pursuant to 4 & 5 *Will.* 4, c. 76, s. 81; and the sessions were of this opinion. Whereupon the attorney for the appellants applied to the Court to adjourn the appeal to the next sessions, that it might then be heard, which, after argument, the sessions ordered to be done. The question for the opinion of the Court was, whether under these circumstances the sessions had power to adjourn the appeal.

1 The statement of the grounds of appeal required by the new Poor Act (4 & 5 *W.* 4, c. 76, s. 81,) must be served on the overseers themselves of the respondent parish, and not on their attorney.

2. Where no statement of the grounds of appeal has been served upon the overseers of the respondent parish, the sessions may notwithstanding receive the appeal and adjourn the hearing of it.

Greaves, in support of the order of sessions.—There are two points to be considered; whether the statement of the grounds of appeal was properly served, and if it was not properly served, whether the sessions had jurisdiction to adjourn the appeal. Now, as to the jurisdiction of the sessions to adjourn appeals, has the new Poor Law Act taken away the power of adjournment which the sessions undoubtedly possessed under 9 *Geo.* 1, c. 7, s. 8? The old act, indeed, makes it imperative upon the sessions to adjourn, if it shall appear to them that reasonable time of notice has not been given;

Rex v. *Justices of Buckinghamshire* (*a*), and *Rex* v. *Justices of Staffordshire* (*b*). Now the 4 & 5 *Will.* 4, c. 76, s. 81, requires that the appellant shall give, in addition to the notice formerly required, a statement of the grounds of appeal; and that, unless such statement shall have been given, the appellants shall not be *heard*. The word "*heard*," in this act, does not mean that the appeal shall not be lodged, but that it shall not be tried, as is plain from the 73d section. The word seems to be applied with reference to the appeal, in much the same sense as the phrase "proceeded upon," in sect. 8, of 9 *Geo.* 1, c. 7. The two statutes, indeed, being in *pari materiâ*, may be taken together, for there is no discrepancy between them on the subject under consideration. The case will then be the same as if the statement, as well as the notice, had been required by the former statute. "It is frequent in our books, that an act made of late time shall be taken within the equity of an act made long time before," *Vernon's* case (*c*): and *Bennet* v. *Edwards* (*d*), *Farr* v *Hollis* (*e*), and *Wilkes* v. *Williams* (*f*), are to the same effect.—[*Coleridge*, J.—Suppose your statement, instead of merely miscarrying in the service, had contained inadequate grounds of appeal, can it be contended that the sessions could adjourn?]—They could do so, even if there had been no statement of any grounds at all. The justices at sessions, as a Court, possess the power inherent in their jurisdiction, to adjourn at their own discretion, which this Court will not control; 2 *Nol. P. L.* 536, and *Rex* v. *Wiltshire* (*g*)—[*Patteson*, J. mentioned *Rex* v. *Oxfordshire* (*h*).]—There the right of appeal was given for the first time in the very same clause requiring the notice, which therefore was considered a condition precedent to the right of *entering* the appeal. In *Rex* v. *Gloucestershire* (*i*), Lord *Mansfield* said, that "the notice directed to be given by 9 *Geo.* 1, does not go to the *receiving*, but the *hearing* of the appeal." But the service of the statement in this case was proper. The act does not require personal service on the overseers. Under the Bankrupt Act, notice of the intention to dispute the bankruptcy may be served on the assignee's clerk, *Widger* v. *Browning* (*k*). In *Rex* v. *Monmouthshire* (*l*), it was held that a notice of appeal, signed by the attorney for the appellants, was sufficient.

Godson, contrà.—If the argument for the appellants prevail, they can give in an entirely fresh statement of their grounds of appeal before next sessions. The 81st section of the new act, requiring the statement, cannot be read with the section of the former act requiring a notice, for the two instruments are to be treated as distinct instruments; *Rex* v. *Suffolk* (*m*). The statement here is like the notice in *Rex* v. *Oxfordshire*, a condition precedent to the right to a hearing. With respect to the kind of service necessary, *Rex* v. *Monmouthshire* cannot apply to this section, according to which a notice must be signed by the overseers or guardians, or three or more of them. The object of this act was to save parishes expense, by compelling them to transact their own affairs, without professional assistance.

(*a*) 3 East, 342.
(*b*) 7 East, 549.
(*c*) Co. Rep. Part iv. 46.
(*d*) 7 Barn. & Cress. 586.
(*e*) 9 Barn. & Cress. 315.
(*f*) 8 Term Rep. 631.
(*g*) 13 East, 352.
(*h*) 1 Maul. & Sel. 446.
(*i*) Cald. 283, in notis to *Rex* v. *Huntingdonshire*.
(*k*) 1 Moo. & Mal. 27.
(*l*) 7 Law Jour. Magistrate's Cases, 95.
(*m*) 4 Ad. & Ell. 315.

LITTLEDALE, J.—I am of opinion that the sessions had power to adjourn this appeal. In this case no question arises on the 9 *Geo.* 1, c. 7, because the notice of appeal was given in reasonable time; but the question arises upon the service of the statement under the 81st section of the Poor Law Amendment Act. The objection is, that the service in this case was upon the attorney of the respondent parish, instead of upon its overseers. The attorney in this case can hardly be considered as the attorney in the appeal to the respondent parish, because, at the time of the service in question, although there had been a notice of appeal given, yet the appeal had not, strictly speaking, been commenced. But without going into that matter, I think that the service of the statement under this act should have been upon the overseers. The 81st section may be explained in this particular by reference to the 79th section, which undoubtedly requires that the notice of the chargeability should be signed by the parochial officers themselves. Here the doubt is as to service on parochial officers; but it is convenient to adopt the construction suggested by the former section, by requiring personal service. Notice of appeal against a rate, under 41 *Geo.* 3, c. 23, may be signed by the party giving the same, or by his attorney; but the alternative is there allowed by the express words of the fourth section. The same section, however, enacts, that in this case it is upon the whole safer to hold that the service should be upon the overseers themselves. Then the question remains, whether, the statement not having been properly served, the sessions had power to adjourn the hearing of the appeal. It appears to me that they have a general power to adjourn. But it is said, that the delivery of the statement is a condition precedent to the entering of the appeal, which must be complied with in the first instance, when the notice of appeal is given, and that as the appellants have once slipped their proper opportunity, they cannot now be heard, and any adjournment would be useless. But the phrase—'that the appellants shall not be heard', does not preclude the sessions from receiving the appeal, and having once received it, they had a right to adjourn the hearing of it, under the general discretion incident to their jurisdiction. It is said, if this adjournment be allowed, that the appellants may before the next sessions deliver another statement containing grounds of appeal altogether different. What may be the effect of that, we need not now consider. It is enough for us to determine at present, that under the circumstances the sessions were not precluded from the adjournment, though they were precluded from the immediate hearing of the appeal.

PATTESON, J.—There are two points to be considered in this case. First, whether service of the statement upon the attorney was good service. I think it is better that we should hold, both with reference to the analogy of the 41 *Geo.* 3, c. 23, and to the letter of this act, that the service must be upon the overseers themselves. The next question is, whether the sessions had any right to adjourn the appeal. I would not have it supposed that the Court founds its decision upon this question on the 9 *Geo.* 1, c. 27; because that statute is imperative in requiring the sessions to adjourn in the event there provided for, and I am not prepared to say that in this case the sessions were *bound* to adjourn. The 9 *Geo.* 1 applies itself only to default in giving the reasonable notice of appeal; this new act superadds the necessity of giv-

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ing also a statement of the grounds of appeal. What is the penalty if that is not given?—That the appeal shall not be *heard*. The act does not say that it shall not be received. There is nothing in the act to restrain the magistrates, if they think proper, to adjourn the hearing of an appeal, where the statement has not been given, until the next sessions, fourteen days before which the statement may be given. There can be no doubt that a general power of adjournment belongs to the sessions; *Rex* v. *Wiltshire* (*a*) is decisive upon that head. *Rex* v. *Oxfordshire* (*b*), is distinguishable from the present case; and the decision in *Rex* v. *Lincolnshire* (*c*), turned upon the words in the 49 *Geo.* 3, c. 68, s. 7, giving an appeal against an order of affiliation, "that no appeal shall be brought, received, or heard;" words much more comprehensive than the words now in question. Here the appeal had been properly entered, and the sessions had power to adjourn it.

COLERIDGE, J.—The question is, whether the appeal was properly entered, because, if properly entered, the sessions had as clear a right, in their general discretion as a court of justice, to adjourn it, as if the absence of a material witness, or any other circumstance, had rendered it inexpedient to proceed with the hearing of it. It is not necessary, therefore, to determine whether the statement was well served or not; but my opinion certainly is, that it was not well served according to the meaning of the act. Still the sessions had possession of the appeal. Suppose a removal had taken place so shortly before the sessions, that the appellants could not give the proper notice of appeal, the appeal might be entered notwithstanding, and the court might adjourn the hearing. That would be the same case with this in principle, there would be an adjournment of the appeal, although no statement had been delivered of the grounds of such appeal. The words in this act have been already distinguished by my brother *Patteson*, from those discussed in *Rex* v. *Lincolnshire* (*d*).

Case sent back to sessions, to enter continuances to the next sessions.

(*a*) 13 East, 352.
(*b*) 1 Maul. & Sel. 446.
(*c*) 3 Barn. & Cres. 548.
(*d*) 3 B. & C. 548.

The KING *v.* The Inhabitants of EXMINSTER.

April 26th.

ON appeal against an order for the removal of *Elizabeth Matthews* from *Dawlish* to *Exminster*, both in the county of *Devon*, the sessions confirmed the order, subject to the opinion of this Court on a case, from which it appeared, that by an indenture dated the 21st *April*, 1826, the pauper was bound apprentice by the churchwardens and overseers of *Exminster*, to *Robert Trood*, an inhabitant of *Exminster*. By an assignment, dated 8th *September*, 1826, she was assigned to the Rev. *Thomas Mellish*, also an inhabitant of *Exminster*, for the residue of the term of her apprenticeship. Another instrument, purporting to be an assignment, dated 8th *October*, 1830, was subsequently executed, with the consent of two justices, in the words following:—

The assignment and acceptance of a parish apprentice (in one instrument) were in the following words:—"*Thomas Melhuish* doth hereby assign the said *Elizabeth Matthews*, and *M. P.* doth hereby agree to accept the said *Elizabeth Melhuish*:—*Held*, that the misnomer did not vitiate the acceptance.

2. Under 56 *Geo.* 3, c. 139, s. 2, which requires a notice of a binding to be given to the officers of a foreign parish into which a parish apprentice is bound, notice of the *assignment* of such apprentice is not necessary.

" Whereas it appears unto us, &c. (reciting the binding and subsequent assignment.) Now be it remembered, that the said *Thomas Melhuish*, by and with the consent of us, &c. &c. doth hereby *assign Elizabeth Matthews*, the apprentice above-named, unto *Moses Paul* of the parish of *Dawlish*, to serve him during the residue of the term above-mentioned, and that he the said *Moses Paul* doth hereby agree to *accept* the said *Elizabeth Melhuish* as an apprentice for the residue of the said term, and doth hereby acknowledge himself, his executors and administrators, to be bound by the agreements and covenants mentioned in the said indenture, on the part of the said *Robert Trood*, to be done and performed, according to the true intent and meaning of the said indenture, and pursuant to the provisions of an act entitled 'An Act for the further regulation of Parish Apprentices (*a*).' " (Signed by the two parties and by the justices.)

Under the instrument above set out the pauper served the said *Moses Paul* in the parish of *Dawlish*, where she resided during such service more than forty days. No notice was ever given by the churchwardens and overseers of *Exminster*, to the churchwardens and overseers of *Dawlish*, of the instrument above set out.

On the hearing of the appeal, evidence was offered by the appellant parish to shew, that instead of *Elizabeth Melhuish*, in the acceptance contained in the instrument above set out, the pauper *Matthews* was intended, which evidence the Court refused to admit.

The questions submitted to the Court were:—1st. Whether, without such evidence, there was any sufficient acceptance of the said pauper by the said *Moses Paul*, as is required by the 32 *Geo.* 3, c. 57, s. 7? 2nd. If not, whether the Court ought not to have admitted such evidence? 3rd. Whether it was necessary that the churchwardens and overseers of *Exminster* aforesaid should have given notice to the churchwardens and overseers of *Dawlish*, in order that the pauper, by virtue of the instrument above set out, and service thereunder, should gain a settlement in *Dawlish*?

Merivale, in support of the order of sessions.—The stat. 32 *Geo.* 2, c. 57, c. 7, contemplates two distinct instruments; one for the assignment, the other for the acceptance of an apprentice; and one instrument never can be referred to in order to explain a variance or correct an error in another. Here the variance exists in the most vital part, in the name of the party who was the subject-matter of the instruments. Assuming then that the act contemplates that two distinct instruments should be employed, the circumstance that one instrument only was employed (which was irregular), and the presence of the word "said," will not avail to cure this variance. The mention of the name *Elizabeth Matthews*, occurred in what ought to have been a different instrument; the word "said" therefore, cannot be held to refer to it. No doubt there are cases, such as *Coles* v. *Hulme*, and others (*b*), where the Court has aided an ambiguity of this kind. Yet it does not at all follow, because the error is purely clerical, and the instrument itself intelligible, that the Court will interfere, *Holding* v. *Raphael* (*c*), where the word of reference "said" occurred as here.—[*Coleridge*, J.—In that case the names of other

(*a*) 32 *Geo.* 3, c. 57. (*b*) 8 Barn. & Cress. 568. (*c*) 5 Nev. & Man. 655.

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parties occurred, and the ambiguity could only be cured by a knowledge of the nature of the instrument.]—At all events this was matter for the discretion of the Quarter Sessions, and as they have declined to assist by amendment, or the admission of evidence, this Court will not interfere in explanation of the ambiguity; this being a patent ambiguity which no extrinsic evidence could be admitted to explain. Again, this assignment is invalid, because no notice of it was given to the overseers of *Dawlish*. It is true the 56 *Geo.* 3, c. 139, s. 2, in words only requires notice to be given in the case of a binding and an indenture; but the object of the statute, which was to give publicity to parish apprenticeships, will be frustrated, if the statute be not construed to apply to assignments also. The same reason exists for giving notice in one case as in the other. In *Rex* v. *Newark-on-Trent* (*a*), *Rex* v. *Threlkeld* (*b*), the Court seem to have acted in the spirit of the interpretation contended for, with respect to the parties to whom notice must be given of the original indenture.

Terrel, contrà, was stopped by the Court.

Lord DENMAN, C. J.—I am of opinion that this was a sufficient acceptance of *Elizabeth Matthews*; the intention of the parties appears too clearly to permit us to doubt on that point. As to the second point, it certainly might be very desirable to apply the provisions of the statute on occasion of the assignment of an apprentice, as well as of the original binding. But the words of the act are distinct, and plainly refer to the original binding, and to that only.

LITTLEDALE, PATTESON, and COLERIDGE, Js., concurred.

Order of Sessions quashed.

(*a*) 3 Barn. & Cress. 59. (*b*) 4 Barn. & Adol. 229.

The KING *v.* The Inhabitants of SCARESBRICK.

April 20*th*.

Township of *S.* was indicted for non-repair of a road lying within it. *Plea*, not guilty. *S.* was proved to be liable generally to the repair of such roads. For the defence an agreement was put in, dated 1591, between the owners of the township *S.* and the owners of the neighbouring township *N.*, for the making of a road and the repair of the part in question by *N.*, and also for the appointment of a lawyer to prepare proper instruments to secure performance. It was also proved, that in 1631, a bill in *Chancery* had been filed by the owners of *N.* for performance, and a commission for examination of witnesses had issued; and that from 1631 the road had been repaired by the owners of *N.*:—*Held*, that it was not, under these circumstances, necessary for the judge to direct the jury to presume that such instruments had been subsequently executed, so as to throw upon the owners of *N.* a liability to repair.

INDICTMENT for non-repair of a highway, situate within the township of *Scaresbrick*, in the parish of *Ormskirk*, and being between the township of *North Meols* and the town of *Ormskirk*, tried before *Patteson*, J. at the last *Lent* Assizes at *Liverpool*. The first count stated, that *Scaresbrick* was a township in *Ormskirk*, which contains several townships, and alleged the customary liability of each to repair its own roads, and that the road in question was out of repair. The second alleged the liability of *Scaresbrick* to repair its own roads, &c. *Plea*, not guilty. At the trial on behalf of the crown, the customary liability was proved as alleged, and that the road was out of repair. For the defendants, in order to shift the liability on the township of

North Meols, a counterpart of an agreement, dated 1591, was offered in evidence, made between two persons then owners respectively of all the lands in the townships of *North Meols* and in *Scaresbrick*, and whose descendants still hold the same. The agreement, after providing for the partition of a certain moss, continued, "In consideration of which partition, &c., the said *Edward Scaresbrick* is contented to grant, permit, and suffer, and to allow unto the said parties, and every of them, and their heirs, and the rest of the inhabitants of *North Meols*, a convenient highway, &c. to the town of *Ormskirk*, through his part and portion of the said moss, containing &c., whereof the said *Edward Scaresbrick* is contented to make or cause to be made the one-half thereof passable for horse and man, and that the said *B. Ritchen*, *J. Bold*, and *H. Hesketh*, make or cause to be made the other half thereof towards the *Meols*, passable for horse and man, &c." The agreement then provided, that *North Meols* should repair a certain portion of the road in *Scaresbrick*, up to the point where a stone was to be placed. The same portion of the road was the subject of the present indictment. The agreement contained a provision for the employment of a lawyer to prepare proper instruments to prepare a further assurance. It was also proved, that in 1631, and during the minority of the then owner of the *Scaresbrick* estate, a bill in *Chancery* was filed by the owner of *North Meols* for specific performance. A commission to examine witnesses had issued, but it did not appear whether or not that commission had been acted on. It was also proved, that ever since the time of this *Chancery* suit, the parties had repaired the parts of the road according to their agreement.

On the part of the crown it was contended, that this afforded no answer, that the defendants were in the same situation as a parish, and that they could not discharge themselves without shewing that a liability, and the consideration for that liability existed in others, and the case of *Rex* v. *St. Giles's, Cambridge* (*a*), was cited. The learned judge, being of opinion that the liability of *North Meols* had not been shewn, a verdict passed for the crown.

Cresswell now moved for a rule *nisi* to set aside the verdict and for a new trial, on the ground of a misdirection.—Here there were materials sufficient to raise the inference, that, in pursuance of the agreement of 1591, there had been a settlement of lands in *North Meols*, for the purpose of keeping this road in repair. Such a settlement might have been made, and the continued repairs by *North Meols* cannot be explained on any other supposition. The learned judge ought, therefore, to have told the jury to presume that such settlement had taken place. It has been said, that an act of parliament may be presumed, if circumstances require it. Here, circumstances required a liability to repair in *North Meols*, *ratione tenuræ*, to be presumed.—[*Patteson*, J.—*Rex* v. *Liverpool* (*b*) was cited at the trial, and is decisive to shew that no *agreement* can exonerate a parish from its common law liability to repair; and *Rex* v. *Hatfield* shews that a parish must establish a clear and certain liability in others in order to establish its own immunity. The liability to repair *ratione tenuræ*, it is said, must exist by prescription. This can hardly be strict law, for prescription rests entirely on a presupposed grant, which may have been actually made within the time of legal memory;

(*a*) 6 Maule & Selw. 260. (*b*) 3 East, 86.

Callis, 117, a, (under the head "Tenure",) and *Porter's* case (*a*). In Sir *Edward Coke's* first report, where it is said, "That if lands were given to repair ways, bridges, calceys, or such like, this doth bind the owners of those lands to do those repairs in perpetuity." The dedication of the land in *Scaresbrick* is a sufficient consideration on the face of the agreement for the reparation by *North Meols*. In *The Mayor of Lyme* v. *Henley* (*b*) it was held, that a grant by the king of a pier, with the profits, &c., was a good consideration for the repair of sea walls. All that is necessary here is to make the presumption that the parties followed up their agreement by completing the legal machinery therein contemplated; a presumption warranted by the circumstance of the repairs having been constantly done by *North Meols* in conformity with that agreement.

Lord DENMAN, C. J.—Whether or not a liability to repair *ratione tenuræ* must be immemorial, we are not now called on to determine. But it is quite clear that there was no sort of evidence offered from which the jury could presume that all this legal machinery, contemplated by the agreement, had ever been in existence. No trace of it is now to be found, and I think that a judge would ill perform his duty who should call upon a jury to make a presumption so entirely unwarranted by the facts.

COLERIDGE, J.—It has been urged that the jury ought to have been told to make the presumption that these conveyances had taken place. In this particular case there certainly were no circumstances whatever from which any such presumption could be made. In my opinion a judge ought never to direct a jury to presume that any thing has taken place, unless there is good ground for actually believing that it has. When acts throughout a long course of time have been constantly done, which must have been illegal unless a certain state of circumstances has existed, then a jury may properly be advised to presume the existence of those circumstances. But that is not at all the case here. Every thing that has been done may be most fully accounted for by the existence of the personal agreement; and that being so, it is quite idle to reject these rational and probable means of accounting for it, in order to assume the existence of this complicated machinery, even supposing that it would effect the object for which the assumption is to be made.

PATTESON, J. concurred.

Rule refused (*c*).

(*a*) 1 Rep. 25 *b*. (*b*) 3 Barn. & Adol. 77. (*c*) *Littledale*, J. was absent.

The KING *v.* The Justices of DERBYSHIRE.

April 27th.

1. A statement of a ground of appeal against an order of removal, that since the alleged settlement in the appellant parish the pauper has gained a settlement by hiring and service in the respondent parish, and also another settlement in a third parish by hiring and service, is not sufficiently explicit under the new Poor Act, (4 & 5 *W.* 4, c. 76, s 81.)

2. Where a parish has two overseers and one churchwarden, the notice of appeal may be signed by the overseers only (*b*).

AN appeal against an order for the removal of a pauper from the parish of *Bradwell* to the parish of *Castleton*, was lodged at the *Derbyshire* Mid-

(*b*) Judgment was not given until the following term.

summer Sessions, 1836. The appellants had given the following notice and statement of their grounds of appeal :—

" To the Overseers of the Poor of the township of *Bradwell*, in the " county of *Derby*.

" We, the undersigned overseers of the poor of the township of *Castleton*, in the county of *Derby*, do hereby give you notice, that we intend, at the next General Quarter Sessions of the Peace to be holden at *Derby*, on the 28th day of *June* next, in and for the county of *Derby*, to try an appeal against an order, &c. &c.: and we hereby inform you, that the grounds of the appeal against the said order are, that the said *H. S.* gained a settlement in the parish or township of *Chapel-in-le-Frith*, in the said county of *Derby*, by hiring and service, for a year and upwards, subsequently to the settlement alleged to have been obtained by her in the said township of *Castleton*, and likewise that the said *H. S.* gained a settlement in the township of *Bradwell* aforesaid, by hiring and service, for a year and upwards; and also by having served several years under a general hiring in the said township of *Bradwell*, after the time when it is alleged she obtained a settlement in the township of *Castleton* aforesaid." Dated, &c.

The appellant parish had two overseers and one churchwarden; the above notice was signed by the overseers only.

At the trial the respondents objected to the appellants entering on their case, because their statement of the grounds of appeal was not sufficiently particular under the 81st section of the new Poor Act. The sessions being of opinion that the statement was not sufficient, confirmed the order of removal, but directed the clerk of the peace to make a special entry that the " Court confirmed the order of removal, because the grounds of appeal were not sufficiently stated in the notice of the ground of appeal." A rule *nisi* having been obtained for a *mandamus* to the justices to enter continuances and hear the appeal,

Whitehurst shewed cause.—The question is, whether the notice or statement of the grounds of appeal in this case was sufficient within the 81st section of the new Poor Act, (4 & 5 *Will.* 4, c. 76.) There are two objections to it; first, it was signed by the two overseers only, and not by the churchwardens.—[*Coleridge*, J.—How can you press that objection now, when it was not taken at the sessions?]—It was unnecessary to take this objection, because the respondents succeeded on another point; but if the *mandamus* go, the objection can then be taken at the sessions, and it may therefore be convenient to have the opinion of the Court upon it at once in order to save expense. Secondly, the notice does not give a sufficient statement of the grounds of appeal. The pauper was removed upon a settlement gained in the appellant parish so long ago as the year 1816, and the appellants resist the order of removal, on the ground that, since this settlement, two other settlements have been gained by him by hiring and service; but they do not give the date of either of the two subsequent settlements, or the name of the masters, or any other particulars. *Rex* v. *Cornwall* will be relied upon by the other side (*a*). The statement allowed in that case was

(*a*) 1 Nev. & Per. 144; *S.C.* 2 Har. & Wol. 157.

undoubtedly very general, although not so general as in this case, for there was a denial of a particular fact with respect to the pauper himself, namely, of his apprenticeship; and, with respect to his children, although there was only the general allegation that they were settled in the respondent parish, yet it was sufficiently manifest that the appellants meant to raise a naked question of law as to the removeability of such children, which were the children of the pauper's wife by a former husband, to the parish of the pauper. Perhaps, therefore, the conclusion come to by this Court in that case was not quite necessary. *Rex* v. *Holbeach* (*a*), and *Rex* v. *Kelvedon* (*b*), are not applicable. It was obviously the intention of the new Poor Act that litigant parishes should come to the sessions, each apprised of the kind of case which the other meant to set up. *Rex* v. *Oxfordshire* (*c*), and *Rex* v. *Sheard and another* (*d*), may be cited in illustration.—[*Patteson*, J.—In *Rex* v. *Oxfordshire* no ground of appeal was stated at all.]—It is cited, for the sake of the observation of *Abbott*, C. J., that, under the general notice there given, the appellants might have made either of two objections to the case of the respondents; whereas under this notice the appellants may make fifty objections. In *Rex* v. *Sheard*, where a question arose upon the sufficiency of a notice of appeal to overseers' accounts, *Bayley*, J. says, "Where a notice is general, and leaves it uncertain upon which of several grounds of objection an item is questioned, can we say that it states and specifies a particular ground?" But the Court has no power to direct the *mandamus* prayed for, for the sessions have heard the appeal and confirmed the order.—[*Patteson*, J.—That can hardly be so, for the statute says that it shall not be lawful for the appellants to be heard, unless they have given the proper notice and statement.]

N. R. Clarke, and *Willmore*, *contrà*.—This appeal was certainly not heard, for it was dismissed on a preliminary objection, and no evidence was admitted.—[*Patteson*, J.—How is the order of sessions to be got rid of?]—In *Rex* v. *Hertfordshire* (*e*), this Court granted a *mandamus* to the sessions to hear an appeal against a rate, which, on the ground of a notice being defective, they had confirmed; and *Rex* v. *Lindsey* (*f*), and *Rex* v. *Lancashire* (*g*), are to the same purpose. With respect to the sufficiency of the statement, *Rex* v. *Cornwall* (*h*) is conclusive. The object of the act was not that the appellants should particularise with minuteness all the circumstances of their case, and so incur the risk of miscarrying by some fatal variance, as in *Rex* v. *Holbeach* (*i*), but merely that the respondents should be saved the expense of bringing witnesses to prove their *primâ facie* case, when it might not be intended to question it; and that if the appellants relied upon a new case, they should state as much generally.

Cur. adv. vult.

LITTLEDALE, J. in the following term (*June* 12), delivered the judgment of the Court. This case was argued in *Easter* term last, in the absence of my

(*a*) 1 Nev. & Per. 137.
(*b*) 1 Nev. & Per. 138.
(*c*) 1 Barn. & Cress. 279.
(*d*) 2 Barn. & Cress. 856.
(*e*) 4 Barn. & Ad. 561.
(*f*) 6 Maule & Selw. 379.
(*g*) 7 Barn. & Cress. 691.
(*h*) 1 Nev. & Per. 144; *S. C.* 2 Har. & Woll. 157.
(*i*) 1 Nev. & Per. 137.

Lord *Denman*, who agrees, however, with the judgment I am about to pronounce.

The question turned upon the sufficiency of the statement of the grounds of appeal given by officers of the township of *Castleton*, in *Derbyshire*, against an order of removal from the township of *Bradwell*, in the same county. The statement alleged as the ground of appeal, that the pauper had acquired a settlement in the parish of *Chapel-in-le-Frith*, by hiring and service, subsequent to the settlement in *Castleton*, without stating the time when, or the name of the master. At the sessions the appellant proposed to give in evidence that the pauper was hired by and served a person in the parish of *Chapel-in-le-Frith*, since his acquiring a settlement in the appellant parish; but the Court refused to hear the evidence, considering the statement insufficient within the 81st section of 4 & 5 *W.* 4, c. 76.

That section requires that the appellants should deliver a statement in writing of the grounds of their appeal, and provides, that on the hearing they shall not go into or give evidence of any other grounds. In this case, if the statement delivered by the appellants was in itself sufficient, they were entitled to give the evidence they tendered at the sessions, notwithstanding the proviso in the act, for it was not evidence of any other ground of appeal; it was to support, by detailed evidence, that ground which was alleged generally in their statement, viz. settlement by hiring and service in the parish or township of *Chapel-in-le-Frith*.

In *Rex* v. *Holbeach* (*a*), and also in *Rex* v. *Misterton* (*b*), decided in the present term, we held that the sessions ought not to have received the evidence tendered, because in those cases the statement of the grounds of appeal in the one, and the examination of the pauper in the other, were sufficient in themselves in respect of the particularity of the statement; but the evidence tendered was at variance with those statements, and when received proved another ground of appeal in the one, and removal in the other. Now, it is obvious that this statement gives no real information to the respondent parish. Without being informed of the time of service, or the name of the master, the respondents would in vain make inquiries in any populous parish as to the fact of the pauper having been hired and served in it; and it seems far more convenient to require greater particularity in the statement. But we were pressed with the authority of the cases of *Rex* v. *Justices of Cornwall* (*c*) and *Rex* v. *Kelvedon* (*d*). In the former, the expressions used by the Court undoubtedly seem to sanction generality of statement. The circumstances were, however, peculiar. The order of removal related to a man and his wife, and her children by a former husband, from *Penryn* to *St. Glauvius*. The examination of the pauper and his wife, a copy of which was delivered to the appellants under the 79th section of the act, shewed that the man was settled in *St. Glauvius*, that the father of the children was settled in *Penryn*, and that they had acquired no settlement of their own. The statement of the grounds of appeal was sufficient as to the man; as to the children, it alleged merely that they were settled in *Penryn*—a fact which appeared upon the papers of the respondents themselves, and which was not in dispute; but it raised a point of law, namely, whether the children, by the operation of the 57th section of the act, (which makes the children part of the second husband's

(*a*) 1 Nev. & Per. 137.
(*b*) Not yet reported.
(*c*) 1 Nev. & Per. 144.
(*d*) 1 Nev. & Per. 138.

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family, for the purposes of the act), were removeable with the man to his place of settlement. The sessions refused to hear evidence that the father of the children was settled in *Penryn*. The Court held that they were wrong. Perhaps the proper course for the sessions would have been, to have taken the fact of the father's settlement as an admitted fact by both parties, and to have refused evidence either for or against it; but they were certainly wrong in excluding the fact from their consideration. The case of *Rex* v. *Kelvedon* (*a*) turned on the sufficiency of the pauper's examination, to shew the ground of removal; as to which, it was justly observed by my brother *Coleridge*, that the language of the act is different in the 79th and 81st sections, and that the act was made with different purposes as to the notices to be given by each side. Again, in that case the information was given to the parish in which the pauper was alleged to be settled, and they, by their statement of the grounds of appeal, shewed that they fully understood the examination, and the grounds of removal contained in it.

The clauses in this act, respecting the grounds of removal and appeal, are intended to compel such a disclosure by both parties, as will enable them to go to the sessions fully aware of the questions which are to be discussed: and we think that we best effectuate such intention by holding that the statement must not be in general terms, but must condescend to particulars, not to the extent of setting out the evidence by which facts are to be proved, but so as to give the opposite party reasonable means of inquiry. Another point was made on the argument as to the persons who signed the notice and statement. This point was not made at the sessions; but if it had, we should hold the notice and statement sufficient in that respect, according to the rule which we laid down, a few days since, in the case of *Rex* v. *Justices of Warwickshire* (*b*).

Rule discharged.

(*a*) 1 Nev. & Per. 138. (*b*) Not yet reported.

WEST, Clerk, *v.* TURNER, Clerk.

April 28th.

57 *G.* 3, c. 99, s. 48, enables the bishop to appoint curates, under certain circumstances, with certain salaries.

Sect. 53 enacts, that such salaries shall be specified in the licence granted by him, that such licence shall be evideuce of the salary in all courts of law and equity, and that in case of any dispute touching the salary, &c. the bisop shal summarily determine the same.

Sect. 74 enacts, that in every case in which jurisdiction is given to the bishop, all other and concurrent jurisdictions shall wholly cease, and no other jurisdiction be used.

DECLARATION in *assumpsit* for work and labour as a curate, and on an account stated. *Plea*, as to the second count, *non assumpsit*, on which issue was joined. To the first count, that the defendant was and still is a clerk in holy orders, and rector of *Luckington*, within the diocese and ecclesiastical jurisdiction of the Bishop of *Salisbury*, and that during the time aforesaid he held and occupied a certain other benefice with cure of souls, within the meaning of the statute 57 *Geo.* 3, c. 99, and during the time aforesaid did not duly reside in the said rectory, within the meaning of the statute; and thereupon, before any of the said work, &c., to wit, 18th *October*, 1830, the plaintiff procured from the Bishop of *Salisbury*, and the bishop did then, in pursuance of the said statute, and in conformity with the provisions thereof,

Held, 1. That the courts of law cannot take cognisance of any dispute respecting the salary, in an action by a curate so appointed a rector, for arrears of salary.

2. That a plea stating his appointment under the act, and that the action was brought to recover his salary, touching which disputes had arisen, was properly pleaded in bar and not to the jurisdiction, and that the nature of the disputes need not be particularly specified in the plea.

duly give and grant to the plaintiff, licence and authority to perform the office of stipendiary curate in the said parish of *Luckington*, in reading the common prayers and performing other ecclesiastical duties belonging to the said office, according to the form prescribed in the book of Common Prayer, made and published by authority of parliament, and the canons and constitutions in that behalf lawfully established and promulgated, and not otherwise or in any other manner, he the plaintiff having first, before the bishop, subscribed the articles, taken the oaths, and made and subscribed the declaration in that case required: and the bishop did, in and by the said licence, in pursuance of the said statute, and in conformity with the provisions thereof, duly assign unto the plaintiff the yearly stipend of 80*l.*, to be paid quarterly, for serving the said cure, together with the surplice fees, and the use of the rectory-house and offices, in which the said bishop thereby required the plaintiff to reside, &c., according to the statute in such case made and provided: and the defendant further says, that the said work, labour, and attendance, in the declaration mentioned, was done and bestowed by the plaintiff for *and at the request of the defendant*, as in the declaration mentioned, under and by virtue of the said licence, as such curate as therein mentioned, and not otherwise howsoever: and that after the doing and bestowing thereof, as in the declaration mentioned, to wit, on the day and year therein mentioned, divers differences and disputes arose, and were and still are depending between the plaintiff and the defendant, touching and concerning the said stipend in the said licence assigned, and the payment thereof and of the arrears thereof, in respect of the said work, labour, and attendance: and that the said action of the said plaintiff, so far as in the introductory part of the plea is mentioned, is brought touching and concerning the said stipend, and the payment thereof, and of the arrears thereof, as aforesaid, and to recover the same and payment thereof, and of the arrears thereof, in the respects aforesaid: touching which premises the said disputes and differences have arisen and are still depending as aforesaid, within the meaning of the same statute, contrary to the tenor and effect of the statute in that case made and provided: and this the defendant is ready to verify, and therefore, and by reason of the statute in that case made and provided, he prays judgment, &c. as aforesaid. To this plea there was a special *demurrer*, assigning the following causes:—

1. That such plea is in effect a denial of the jurisdiction of this Court, although it professes to be pleaded in bar of the action.

2. That the jurisdiction of this Court cannot be ousted except by express words, which the statute of 57 *Geo.* 3, c. 99, referred to in the plea, does not contain.

3. That the defendant, by his said second plea, admits that the first promise stated in the declaration was made by him, and that such promise was founded upon a valuable consideration moving from the plaintiff at the request of the defendant, and that the said second plea shews no cause why the defendant should be excused from the performance of such promise, but, on the contrary, appears to be directed to the purpose of shewing that the services stated in the declaration were performed, not at the request of the defendant, but *in invitum*, and that no promise arose or was made.

4. That supposing the jurisdiction to have been exclusively in the bishop, under the statute of 57 *Geo.* 3, c. 99, yet an action will lie in a Court of common law upon a promise founded upon a valuable consideration, although

King's Bench. antecedently to such promise the remedy would have been before the bishop.

WARE v. TIPPER. 5. That the matters stated in the said second plea are pleaded in denial of the matters of fact, from which the promise stated in the declaration is implied and inferred by law, and might, as far as they are relevant or material, have been given in evidence under a plea of *non assumpsit*.

6. That the plea doth not shew what particular differences or disputes arose, and were and are depending between the plaintiff and defendant, touching and concerning the stipend and the payment thereto.

7. That the plea states no matters of fact for the decision of a jury, respecting the truth or falsehood of which, if issue was taken thereon in the replication, the Court would be enabled to say, whether the plaintiff is entitled to recover such residue from the defendant.

8. That although the said second plea professes to admit the promise first laid in the declaration, yet it amounts to an informal and a multifarious denial of such promise.

9. That the plaintiff cannot take issue upon any part of the said second plea, without thereby endangering his remedy for the value of services acknowledged to have been performed, by the admission, expressed or implied, of various allegations, which may be wholly unfounded, and which, under the plea of *non assumpsit*, the defendant would, according to the course of the common law, as well as by the new rules as to pleading established in *H.* T. 4 *W.* 4, be bound to prove (*a*).

Manning, in support of the demurrer.—The jurisdiction of the Courts of Law is expressly recognised by sect. 53, which provides, that the licence shall be evidence of the amount of the salary in all Courts of Law and Equity. It must therefore be presumed that the exclusive jurisdiction given to the bishop by sect. 74, must apply to matters other than the salary; or if it applies to the salary at all, it must be confined to questions relative to the original liability of the rector, and it does not exclude the jurisdiction of this

(*a*) 57 *G.* 3, c. 99, s. 48, enacts, that in case any spiritual person holding a benefice shall not reside or be absent, &c. without leaving a proper curate, &c. or nominating a curate to the bishop, the bishop shall be authorized to appoint a proper curate, with such salary as is by that act allowed, to serve the church, &c.

Sect. 53, that it shall be lawful for the bishop, and he is hereby required, subject to the several provisions and restrictions in this act contained, to appoint to every curate such salary as is allowed and specified in this act, and every licence to be granted to a stipendiary curate under this act shall contain and specify the amount of the salary allowed by the bishop to the curate, and such licence, or any copy of the registry thereof, signed by the registrar of the diocese or his deputy, shall be evidence of the amount of the salary so appointed to any curate in all courts of law or equity; and in case any difference shall arise between any rector or vicar or person holding any benefice and his curate, touching such stipend or allowance or the payment thereof, or of the arrears thereof, the bishop, on complaint to him made, may and shall summarily hear and determine the same, and in case of wilful neglect or refusal to pay such stipend, salary, or allowance, or the arrears thereof, he shall be and is hereby empowered to proceed by monition and sequestration to sequester the profits of the benefice, for and until payment of such stipend or allowance, or the arrears thereof.

Sect. 74, that in every case in which jurisdiction is given to the bishop of the diocese, or to any archbishop, under the provisions of this act, and for the purposes thereof, and the enforcing the due execution of the provisions thereof, all other and concurrent jurisdiction in respect thereof shall wholly cease, and no other jurisdiction in relation to the provisions of this act shall be used, exercised, or enforced, save and except such jurisdiction of the bishop and archbishop under this act, any thing in any act or acts of parliament, or law or laws, or usage or custom to the contrary notwithstanding.

Court where the liability is founded on an express promise. Another material ground of demurrer is, that there is no statement of the nature of the differences and disputes which have arisen. These certainly ought to have been set out, because otherwise it is impossible for the Court to determine whether or not they fall within the act. Besides, the plaintiff had a right to full information respecting them. He might then have traversed their existence with effect. Had he taken issue on the plea, as it now stands, he might, after disproving the existence of some differences set up at the trial, have been continually met by others, till at last the defendant might have brought forward one dispute which, from the mere ground of having had no previous notice, the plaintiff might have been unable to disprove.

Cowling, in support of the plea.—The jurisdiction of this Court is taken away.—[Lord *Denman*, C. J.—The Court think with you on that point.]—Then if so, that may be pleaded in bar to the action, and any other mode of pleading it would be bad. In *Parker* v. *Elding* (*a*) it was held, that where by statute a party was restrained from suing for a debt under 40*s.* in a superior Court, this ground of defence to an action so brought might be taken in evidence under the general issue. The plea shews matter by which the plaintiff is for ever concluded from having any action at all in any Court whatever, and is therefore properly in bar. The 2nd objection has already been disposed of by the Court. The statement in the 3rd is not correct; the plea expressly states the work to have been done "at the defendant's request." As to the 4th objection, perhaps if there had been an express promise, the objection might have been valid, but here there is no ground for saying that there was such express promise; and upon these pleadings there would have been no necessity to prove one. With respect to the 5th objection, the plea admits the facts raising the implied promise, but adds others, shewing that such implied promise did not arise. Such a defence must be specially pleaded, and cannot be given in evidence under the general issue; *Passenger* v. *Brooks* (*a*). 6th. The words used in the plea are those of the act itself, and it would have been improper to set out the particulars of the dispute, for the very policy of the act was to withdraw such matters from public notice, and confine them to the cognisance of the bishop only; and this not being a plea in abatement, such particularity is not necessary. 7th. There are several matters which the plaintiff might have traversed, *e. g.* the residence or the licence. 8th. The answer to the fifth objection applies also to this and to the 9th; and the plaintiff might also have replied *de injuriâ*.

Manning in reply.—*Parker* v. *Elding* is merely the refusal of a rule *nisi*, it was not there urged by counsel that the plea should have been to the jurisdiction. The question was only whether the Court would take notice of the statute.—[*Coleridge*, J. referred to the case of *Taylor* v. *Blair* (*a*) cited in *Parker* v. *Elding*.]

Lord DENMAN, C. J.—The objections ultimately pressed upon us are two. First, that the nature of the disputes and differences is not apparent upon the plea; and secondly, that the matter of defence should have been pleaded

(*a*) 1 East, 352.
(*b*) 1 Bing. New Cases, 567; S. C. 1 Hodges, 123.
(*c*) 3 T. R. 452.

to the jurisdiction, and not in bar. With regard to the first, I have no doubt that the statement is sufficient to let in proof of the nature of those disputes and differences, and I do not see why an inquiry might not have been gone into under that plea, as to whether the salary was the subject of them or not. The ground of action then being within the operation of the 53d clause, there is no doubt that by the 74th clause the jurisdiction of this Court is taken away, The terms used are decisive to shew that no other jurisdiction than that of the bishop shall interfere, and that he shall have entire power to regulate the salary paid, under all circumstances. It is then urged that the plea should have been to the jurisdiction. As to that, it is enough to say that this plea does not set up another Court in exclusion of the jurisdiction of this Court. It states in effect that there is no Court in which a party, circumstanced as the plaintiff is, can recover at all. It amounts to a total denial of all power in the plaintiff to proceed in the case, the act having established a different mode for the adjustment of his claim. Lord *Kenyon* seems to have acted upon the same view when pronouncing his decision in the case of *Parker* v. *Elding* (*a*), every word of which is applicable upon the present occasion, and we could not, without overruling it entirely, decide in favour of the plaintiff. In *Parker* v. *Elding* the evidence was admitted under the general issue. The present plea was pleaded after the existence of the New Rules, and the facts pleaded shew that another complete remedy has been given, and that our jurisdiction is expressly taken away. I think therefore the plea is good.

PATTESON, J.—The questions are, whether the jurisdiction of the Court is ousted by the 74th clause of the act of parliament, whether the plea in bar is good, and whether there is a sufficient allegation to shew that the salary is the matter in dispute. Now the 74th section of the act says, that wherever power is given to the bishop, all other and concurrent jurisdiction in respect thereof shall cease. The words are very general, and it seems to me, supposing it to be shewn by the pleading that the subject-matter of this action is within the jurisdiction of the bishop, it is quite clear that the jurisdiction of this Court is taken away. But it is then said, that the defence should have been pleaded to the jurisdiction. Now this is a transitory action, and it is laid down in *Tidd's* Practice (*a*), that in a transitory action the defendant cannot plead to the jurisdiction of the Court, unless the plaintiff by his declaration shew that the cause of action occurred within some other jurisdiction; and even then it must be averred in the plea that the defendant dwells in that other jurisdiction, or has goods to which a judgment can attach. Whether that proposition is laid down too generally, I do not stop to inquire. But it is further laid down with respect to conusance, that of the three sorts in existence, the last only, "a conusance of pleas with exclusive words," can be pleaded. That is, where the king grants to a city that the inhabitants shall be sued there and not elsewhere. That plea therefore involves the existence of a jurisdiction elsewhere. But this case is one where no other jurisdiction could be shewn, since, as my lord has already observed, the 74th section of this act in effect says, that no action shall be brought any where. There could not therefore be any plea in abatement to the jurisdiction of this Court. Upon the question itself of jurisdiction, I confess at first I thought otherwise, by

(*a*) 3 T. R. 452, 1 East, 352. (*b*) p. 631, 9th ed.

reason of the words used in the 53d section, that "the bishop's licence should be evidence of the amount of the salary so appointed in all Courts of Law and Equity." Which seem to imply that the amount of salary might somehow or other come in question before a Court of Law. That may possibly be so. But still there is not sufficient to take away the effect of the 74th section, if the facts disclosed upon this plea expressly point out the jurisdiction of the bishop to have existed as to the subject-matter. Now the *plea* first of all states the non-residence. That averment is with a view to shew that under such circumstances the bishop is the proper person to grant a licence and a stipend, and in that licence to state what the stipend is to be. It was necessary to shew upon the face of this plea something that authorised the bishop to appoint the stipend, and that something is the non-residence of the defendant. The plea goes on to say, that the bishop gave a licence and appointed a stipend, and that there are disputes "touching such stipend, &c.;" the very words of the 53d section, which enacts, that the bishop, where there any disputes, shall hear and determine the same in a summary manner; and further, in case of wilful neglect, &c. empowers him to enforce the payment by monition and sequestration of the profits of the living. From this it is plain that the bishop has jurisdiction given him where there are any disputes touching the stipend. This plea says that there were such disputes; and says further, that the action is brought touching and concerning the said stipend, and to recover the same and the payment of the arrears thereof, touching which payment these disputes have arisen. Thus there is the most pointed averment in the plea that there are disputes, and that this action is brought in respect of the failure to pay the stipend. Nothing can more clearly shew that this case is, according to this section, within the jurisdiction of the bishop. But then it has been urged, that the plea should point out the express disputes. But let us see what would be the effect of that. They might be traversed, and if so, that would be giving to another tribunal than that of the bishop, namely, to the tribunal of a jury, the decision respecting the circumstances and the existence of the facts upon which the disputes arose; that is to say, there would then ensue the very thing which the act intended to avoid. However it is sufficient to say, that the plea does state a certain fact of which the bishop is properly cognisant, and that this action is brought respecting it. The plea is therefore good, and this action cannot be maintained.

COLERIDGE, J.—I quite agree with the rest of the Court. With regard to the objection, that the plea ought to have been to the jurisdiction and not in bar, I had some doubts; but I do not think our decision in this case will in the least trench upon the established doctrine relating to pleas to the jurisdiction. A plea of that kind must shew some other Court in which the matter can be tried. By the statute, disputes of this nature are referred to the bishop in the character of an arbitrator. He, and he only, is to determine respecting them, and they are wholly withdrawn from the consideration of all other courts whatever. Therefore, the short answer to Mr. *Manning's* argument is, that this is not a plea to the jurisdiction, but is a plea in bar; and the action is shown to be for a matter concerning which the act says no action whatever shall be brought.

Manning applied for leave to amend, which was refused.

Judgment for defendant.

King's Bench.

May 3d.

FORD *v.* LECHE.

A plaintiff wrote the following letter to the under-sheriff:—
"*June* 8th, 1832.
"*Myself* v. *Dickenson*.
Aldridge v. *Same*.
"I inclose you writs herein, and shall feel obliged by your granting warrants thereon, directed to Mr. *Bateman* and Mr. *Mee*. I shall write to Mr. *Bateman* in a day or two."
Dickenson was afterwards arrested by *M.* at the suit of another person, and on giving a bail-bond was discharged, no further advice having been received from the plaintiff.
Held, 1. That the plaintiff by his letter had appointed *B.* and *M.* his special bailiffs.
2. That although on the arrest in the other suit the prisoner was also constructively in custody at the suit of the plaintiff, yet the sheriff was not liable for an escape, as the special agency of the officer to the plaintiff still continued.

CASE against the defendant as Sheriff of *Cheshire*. First count, for permitting one *Dickenson* to escape; second, for wilfully neglecting to execute a writ against the same party. *Plea*, the general issue. There were other pleas which were not material. At the trial before Lord *Abinger*, C. B. at the *Liverpool* Summer Assizes, 1835, it was proved that the following letter from the plaintiff was sent by post and duly received by the under-sheriff:—

"26 *Pall Mall*, 8th *June*, 1832.

"Sir,

"*Myself* v. *Dickenson*.
"*Aldridge* v. *Same*.

"I inclose you writs herein, and shall feel obliged by your granting warrants thereon, directed to Mr. *Bateman* and Mr. *Mee*. I shall write to Mr. *Bateman* in a day or two.

"I am, &c.,
"*George Samuel Ford*."

Inclosed was an *alias testatum capias*. It did not appear that *Bateman* was written to. *August* 20th, *Dickenson* was arrested by *Mee* on a writ issued *June* 5th, in an action at the suit of one *Rannie*; as to which action he entered into a bail-bond, and was then discharged by *Mee*, who was not aware of the existence of any other writ against him. Upon these facts the learned judge nonsuited the plaintiff, on the ground that the sheriff was exonerated from all liability in consequence of the plaintiff's having nominated the parties to whom the warrant was to be directed.

R. Alexander, in *Michaelmas* term, obtained a rule calling on the defendant to shew cause why the nonsuit should not be set aside and a new trial had.

Cresswell, *Wightman*, and *Tomlinson*, now shewed cause.—The sheriff in this case is not responsible, in consequence of the party having chosen his own bailiff. Many cases have decided that principle; *De Moranda* v. *Dunkin* (*a*), *Hamilton* v. *Dalziel* (*b*); and with good reason, because otherwise a party might appoint a special bailiff for the express purpose of colluding with him in the escape of the prisoner, and afterwards recover from the sheriff. In *Taylor* v. *Richardson* (*c*), the facts were different from the present case; there the defendant, at the time of his discharge, had been delivered over to the sheriff. Here the officer who apprehended *Dickenson* was the agent of the plaintiff up to the time of the escape. If *Mee* had handed over *Dickenson* to the sheriff, his agency would have terminated, and the responsibility of the sheriff would have begun. The case would then have fallen within the principle of *Taylor* v. *Richardson* (*c*). If *Mee* had been in possession of a warrant, granted in pursuance of the plaintiff's direction, it is quite clear that the sheriff would not have been liable. If then he be held liable in the present case, it must be contended that the sheriff is in

(*a*) 4 T. R. 119. (*b*) 2 W. Black. 952. (*c*) 8 T. R. 505.

a worse condition when the arrest is only constructive than when it is actual. Neither can any negligence be attributable to the sheriff in not issuing his warrant, because, by the terms of the letter of the plaintiff, it plainly appears that he contemplated some further instructions which he neglected to communicate. In *Benton* v. *Sutton* (*a*), the officer who permitted the escape was not appointed by the party.

R. Alexander and *J. Bayley, contrà.*—The principle of *Frost's* case (*b*) applies, the party having been taken under *Rannie's* writ, when the writ from the plaintiff was lying in the sheriff's office. The principle of *Jackson* v. *Humfrey* (*c*), and of the other cases, is not affected by the distinctions attempted to be drawn. Lord *Kenyon*, in *Taylor* v. *Richardson* (*d*), which is an express authority for the plaintiff, says that the sheriff should not have discharged the party without inquiring whether there were not any other detainers against him. The observations of *Eyre*, C. J. in *Benton* v. *Sutton* (*a*) are to the same effect. In *De Moranda* v. *Dunkin* (*e*), the application was not to the under-sheriff, but to the sheriff himself, which was one of the grounds of *Buller*, J.'s judgment. So in *Hamilton* v. *Dalziel* (*f*), it was sent to a person who was not the acting under-sheriff.—[*Patteson*, J.—In *Porter* v. *Viner* (*g*) it was held, that giving instructions to a particular bailiff discharged the sheriff.]—*Pallister* v. *Pallister* (*h*) is to the same effect; but in those cases the party interfered after the writ was sent to the sheriff's office. In *Balson* v. *Meggatt* (*i*), the terms used in the letter were not so strong as in this case. Even if it be held that the intimation that the plaintiff would write to *Bateman*, must mean that *Bateman* was not to act without further instructions, still nothing of that kind can apply to *Mee*.

Lord DENMAN, C. J.—The first question is, whether the plaintiff did, in point of fact, appoint his own bailiff, and I do not think that there can be the slightest doubt that he did. In his letter he desires the under-sheriff to direct warrants to two persons of the names of *Mee* and *Bateman*, and then adds, "I shall write to *Bateman* in a day or two." It requires a great deal of ingenuity to attach any other meaning to that letter than this:—"You, the sheriff, are to be my agent, to direct warrants upon these writs to two officers whom I appoint, and to which officers I mean to give directions in a certain time." By these instructions I think the authority of the sheriff was superseded, and that *Mee* and *Bateman* were selected for the purpose of executing the writs on the part of the plaintiff, and not of the sheriff. The plaintiff's writ issued on the 8th of *June:* on the 5th of *June* a writ had issued against the same debtor, at the suit of *Rannie*, another creditor. On that writ the debtor was arrested, and was in custody in some sense at the suit of the plaintiff in his action, as well as at the suit of *Rannie*. But the question is, whether upon this arrest he was so far in the custody of the sheriff, with regard to the writ issued by the plaintiff, that the plaintiff may charge the sheriff with an escape. The escape takes place on the occasion of a bail-bond being given in the other action, and the defendant is let out of custody

(*a*) 1 Bos. & Pul. 24.
(*b*) 5 Co. Rep. 89.
(*c*) Salk. 274.
(*d*) 8 T. R. 505.
(*e*) 4 T. R. 119.
(*f*) 2 W. Black. 952.
(*g*) 1 Chit. 613 n.
(*h*) 1 Chit. 614 n.
(*i*) 1 Har. & Wol. 659; *S. C.* 4 Dowl. P. C. 557.

King's Bench.

FORD v. LEIGH.

before the plaintiff has made any communication to *Mee* and *Bateman*. I think, therefore, that the escape having been from an officer appointed by the plaintiff, the sheriff is relieved from all responsibility. This principle has been recognised in so many cases that it would be idle to enlarge upon it now. It was fully discussed by Mr. Justice *Buller* in the case which has been alluded to, and there is also the case of *Porter* v. *Viner* (*a*), where the same principle is fully recognised. The case before my brother *Coleridge* seems distinguishable. The mere loose expression of a wish to have a particular officer appointed, is not to be considered in the light of an appointment of an officer, so as to supersede the authority of the sheriff. But here the party acts in such a way as to take from the sheriff all power except to issue the warrants in the manner required.

LITTLEDALE, J.—I am of the same opinion. I have no doubt that *Mee* and *Bateman* must be considered as bailiffs specially appointed by the plaintiff. The effect of the letter was, that the under-sheriff was not bound to send warrants at all to these persons until he received further instructions from the plaintiff. His duty was therefore suspended for a time. Afterwards, *Dickinson* was arrested at the suit of *Rannie*, and gave a bail-bond. Now I have no doubt whatever that the moment he was arrested at the suit of *Rannie*, he would have been, under ordinary circumstances, arrested in law at the suit of the present plaintiff, and so become in custody of the sheriff in that suit also. It may then be said that it was the duty of the sheriff to place him in his actual custody, and that, not having done so, he is answerable for the escape. However, I think he is not; for although this is an escape, it cannot be considered, in point of law, an escape for which the sheriff is answerable. The warrants were to be granted to two persons named in the plaintiff's own letter, and after that, what had the sheriff to do? The plaintiff having taken the matter out of his hands, it was not part of his duty to give notice to the two officers selected of this arrest, or in any way to interfere. The letter, taken altogether, seems to me to amount to a total suspension of the authority of the under-sheriff, and the effect of that is to exempt the sheriff from liability.

PATTESON, J.—I am of the same opinion. Our decision in this case will not throw any doubt whatever upon the law with respect to the general duty or liability of sheriffs. I take it to be quite clear, that if a man is in the custody of the sheriff, and afterwards another writ is lodged with the sheriff against that same person, the mere lodging of the second writ places him in the custody of the sheriff as to the second action, for the plain reason given in *Frost's* case, that though he cannot take the man, which would otherwise be his duty, because he is in his custody, still he must discharge the other part of his duty, which is, to safely keep him. It is also clear, that if the sheriff has a writ sent to him, and he issues a warrant upon that writ to his officer, and afterwards, before the defendant is arrested upon that warrant, other writs come into the sheriff's office, then the sheriff is bound to arrest upon those writs, just as much as upon the writ upon which he has already granted a warrant; and if the officer does arrest under that warrant, the moment he has the man in custody upon the one writ, he becomes in the custody of the sheriff upon all the writs in his office. And, why? Because

(*a*) 1 Chit. 613, n.

it is the duty of the sheriff to arrest upon all the writs, and to give warrants upon all, and to inform his officers that all those writs have been lodged in his office. That principle is not, however, affected by our decision in this case, because we now decide upon the ground that the plaintiff has appointed special bailiffs by his letter, which not only requests a particular person to be appointed to execute this writ, but it goes on to say, "I will communicate with *Bateman* in the course of a day or two;" thus taking the matter entirely out of the sheriff's hands. It is saying in effect, "You are not the person to communicate with the bailiff. I will communicate with him, and I appoint him to execute the writ upon the present occasion." The case decided by my brother *Coleridge* went upon the ground, that the mere suggestion of a party that he wished a particular officer to be appointed, is not the appointment of a special bailiff. To that I agree, and the question whether special bailiffs have been appointed in a particular case, is perhaps matter of evidence rather than of law. Now assuming that special bailiffs were appointed, how does this case stand? It happens that one of the persons appointed is the same man who held the other warrant; but that circumstance makes no difference in principle. If that circumstance had not existed, the sheriff would have been prevented from sending the warrant in this particular action to the person who had the warrant in the other. There is no pretence for saying, that if an officer has a warrant in one action against a party, the mere circumstance of other writs being in the sheriff's office against the same party will authorize that officer to keep him on those writs, without having warrants upon them also. He might perhaps keep the party for a reasonable time to inquire whether there were other writs against him; but it is quite clear that he could not do so permanently without the authority of a warrant from the sheriff; and that the sheriff is prevented from giving that by the appointment of a special bailiff. The general rule then applies, that when a person appoints his own bailiffs, the sheriff is discharged from all responsibility. It is perfectly true, that if a special bailiff arrest a party, and deliver him over to the custody of the sheriff, then the special authority ceases, and the sheriff becomes liable. But in this case the party never was in the custody of the sheriff, and the plaintiff has precluded himself, by his own letter, from making the sheriff responsible.

COLERIDGE, J.—I am of the same opinion. With regard to the first point, whether *Bateman* became the special bailiff of the plaintiff, I think that he did. I should not add more, if reference had not been made to the case of *Balson* v. *Meggatt* (*a*). Whether that case is right or wrong, it seems to me distinguishable from the present, and in my decision I had no intention of going further than the circumstances of that case required. It is well known, that where a number of writs come from a particular attorney's office, there is generally an understanding between him and the under-sheriff, that the writs shall be executed by particular bailiffs, in whom the attorney has confidence, and with whom he has made an arrangement; but the attorney never intends by so doing to relieve the sheriff from the responsibility of employing his own officers. Now in this case, it seems to me, looking at the plaintiff's letter, and seeing what light the evidence in the case throws upon it, that there is no doubt *Bateman* and *Mee* were appointed the special bailiffs of the plaintiff. I take the rule of law to be quite clear, that so long

(*a*) 1 Har. & Wol. 659; 4 Dowl. P. C. 557.

King's Bench.

FORD v. LECHE.

as the agency of the special bailiff continues, the sheriff is not liable. The question therefore is here, whether, at the time of the alleged escape, the agency of *Bateman* to the plaintiff had ceased. I certainly think that it had not. It has been urged, that when *Dickenson* was arrested, he was actually as much in custody of the sheriff as if he had been arrested and delivered into the custody of the sheriff at the suit of *Ford;* and, therefore, that there was an end of the agency of *Bateman* towards *Ford.* No doubt, in certain circumstances of actual arrest and delivery into the custody of the sheriff, or arrest by a general bailiff, the arrest in one suit is an arrest in all suits in which writs have been left in the sheriff's office. That is a point established by a great many cases; but the question is, whether that rule applies to this particular case. Now, in order to try that, I do not know whether there can be a fairer criterion than that put by Mr. *Cresswell*, that supposing *Bateman* had actually arrested the man, would the agency of *Bateman* have ceased? It cannot surely be said that a constructive arrest can carry the case further than an actual arrest would. I think the agency in the case supposed would not have ceased; and if not, certainly it cannot have ceased in the present case. Suppose another case, that a plaintiff, in an action of importance, had confidence in a particular bailiff, and requested that he might be employed; that a writ came to the sheriff against the same defendant for a small sum of money, and the warrant was issued by the sheriff to a particular bailiff other than the one in whom the plaintiff had confidence, according to the doctrine laid down, the man in whom he had not confidence would be the person on whom he must rely for the execution of the writ.

Rule discharged.

MINTER *v.* MOWER.

The specification of a patent improved chair stated the invention to consist "in the application of a self adjusting leverage to the back and seat of a chair, whereby the weight on the seat acts as a counterbalance to the pressure against the back." Before this patent was taken out, a chair had been made and sold by *B.*, to which the same mechanical principle had been applied, although the operation of it was incumbered by some additional machinery: —*Held*, that the patent could not be sustained, inasmuch as the specification claimed more than the patentee had invented, and would have precluded *B.* from making his own chair.

Semble, that had the specification been for an improvement only in the application of the principle, it would have been good.

CASE for infringement of a patent. The third plea, upon which alone any question arose, was, that the specification did not particularly describe or ascertain the nature of the invention or improvement, or in what manner the same was to be effected.

At the trial before Lord *Denman*, C. J. at the *London* Sittings after *Trinity* term, 1835, it appeared that the patent, dated 9th *November*, 1831, was taken out "for an improvement in the construction, making, or manufacturing of chairs," to be denominated "*Minter's* patent Reclining Chairs," and was thus described in the specification:—"My invention of an improvement in the construction, making, or manufacturing of chairs, consists in the application of a self-adjusting leverage to the back and seat of a chair, whereby the weight on the seat acts as a counterbalance to the pressure against the back of such chair, and whereby a person sitting or reclining in such chair, may, by pressing against the back, cause it to take any inclination, and yet at the same time the back of such chair shall, in whatever position it is placed, offer sufficient resistance and give proper support to the person so sitting or reclining in such chair, &c.;" concluding thus:—"What I claim as my invention is the application of a self-adjusting leverage

to the back and seat of a chair, whereby the weight on the seat acts as a counterbalance to the pressure against the back of such chair, as above described."

It was proved that the chairs made by the plaintiff corresponded with the description in the specification, and that the chair sold by the defendant acted upon the same principle. On behalf of the defendant, a chair made by one *Brown*, and sold in 1829, was produced, which was proved to comprise the same machinery as the chair made by the plaintiff. In addition to it, however, a pad, a spring, a rack, and pinion, were also attached; and, in order to allow the machinery to operate, pressure upon the pad was necessary. The jury found, that if the pad, spring, rack, and pinion had been removed from *Brown's* chair, that it would have acted in the same manner as the plaintiff's chair. They also found that *Brown* was the inventor of the machinery, and had discovered the principle, but was not aware of the practical purposes to which it might be applied. Upon which his lordship caused a verdict to be entered for the plaintiff, giving leave to the defendant to move to set the verdict aside and enter a nonsuit; pursuant to which, a rule having been obtained in *Michaelmas* term, 1835, by *Talfourd*, Serjt., cause was shewn last *Hilary* term (*a*) by

Sir *J. Campbell*, A. G., Sir *F. Pollock*, and *J. Evans*.—It will be urged on the other side, that the specification is too large, but that is not so. The patent is not taken out for the principle, it is expressly limited to the *application* of the principle; and that was the answer given by Lord *Lyndhurst* to the application for a nonsuit after a former trial relative to this patent (*b*). That also appears by reference to the title and specification of the patent. It is true the jury have found that *Brown* was the inventor of the principle, but they have also found expressly that he was ignorant of the application of it; and there can be no pretence for saying that *Brown's* chair does contain any such application. His chair did not allow the principle of self-adjusting leverage to operate of itself. Parts of the machinery had no other object than to prevent its operation. Now an improvement is not the less when caused by taking any thing away that is useless, than when caused by adding something that is useful. It will be said that *Brown* had made the same application of the principle as the plaintiff; because, by taking away from *Brown's* chair the spring pad &c., the chair becomes the same as the plaintiff's. It would be just as reasonable for a man who had a block of marble to contend that it *was* a valuable piece of statuary, because by taking away the outside it would *become* so. Even if the principle of a patent has been before applied, yet if the party applying it has done so only as an experiment, and afterwards abandoned it, the patent may be supported: per *Patteson*, J. in *Jones* v. *Pearce* (*c*). It is not contended that the plaintiff ever saw *Brown's* chair; but even if he had, and if *Brown* had himself known of this application of the principle, still never having publicly produced such application, this patent is nevertheless good; and the case would then fall within the principle of *Dollond's* case, cited by *Buller*, J. in *Boulton* v. *Wall* (*d*).

(*a*) Before Lord *Denman*, C. J., *Patteson*, and *Williams*, Js.

(*b*) *Minter* v. *Wells*, 1 C. M. & R. 505.

(*c*) Godson on Patents, Supplement, 10.

(*d*) 2 H. Bl. 470, 487.

King's Bench. Minter v. Mower.

Talfourd, Serjt., and *Godson*, *contrà*.—The patent was not taken out by the plaintiff for an application of the self-adjusting leverage principle in the particular way in which he has employed it, but generally for any application of it. He virtually lays claim to the invention of all chairs in which that principle is any where found. If the patent is to be supported, *Brown* might be prevented from making his own chair. The plaintiff might say the energetic principle is the same as that to which I lay claim, the things in addition are only those by which that principle is confined. The point really is, whether the principle did not palpably exist in *Brown's* chair. If it did, which indeed is found by the jury, then the question comes to this: suppose a man to have invented $a+b$, can another afterwards have a patent for a? —[Lord *Denman*, C. J.—You thought that a could not produce a certain effect, which however a could produce, and which was restricted in its operation by the addition of b.]—The b did not restrict the operation, it only suspended it. The self-adjusting leverage acted fully as soon as b was withdrawn. In the case in the *Exchequer* the plaintiff succeeded, because there it appeared that he actually was the person who did first apply the principle. The evidence which was wanting in that case was supplied here, so that the claim to novelty is now negatived. The patent ought to have been taken out for a new chair on leverage principles. *Dolland's* case is altogether distinct from this; there Dr. *Hall* had never produced his invention out of his study, and had *Brown's* chair been made a long period before, then *Jones* v. *Pearce* (*a*), *Lewis* v. *Davis* (*b*), and *Lewis* v. *Marling* (*c*), might have been applicable. But now they are clearly not so, because the taking out of the patent was the sole cause why more of *Brown's* chairs were not sold. —[Lord *Denman*, C. J.—We are of opinion that the making and selling of one chair affords, under the circumstances, a sufficient foundation for your arguments.]

Cur. adv. vult.

Lord DENMAN, C. J. now delivered the judgment of the Court.—An action between the same parties has already been decided by the Court of *Exchequer*, in which the patent claimed by the plaintiff was deemed good and valid. But on the trial in this Court, an entirely new fact was given in evidence, and affirmed by the verdict of the jury, namely, that a chair very closely resembling that made by the plaintiff's patent, had been made and sold before that patent was taken out. The words of the jury were these:—"We are of opinion that *Brown* was the inventor of the machine, and found out the principle, but not the practical purpose to which it is now applied; we think that *Minter* (the plaintiff) made that discovery." This statement might not be fatal to the plaintiff's title if his invention were truly set forth in the specification, but the issue in this cause being simply whether the plaintiff did thereby particularly describe and ascertain the nature of the said invention, we find it needful to examine the terms of it. Now the patent is taken out for "an improvement in the construction, making, or manufacturing of chairs." The method of making the machine, and the way in which it acts, are then fully described, without any mention of any of the

(*a*) Godson on Patents, Supplement, 10.
(*b*) 3 C. & P. 502.
(*c*) 4 C. & P. 52.

means employed in *Brown's* chair. The specification thus concludes: "What I claim as my invention is the application of a self-adjusting leverage to the back and seat of a chair, whereby the weight on the seat acts as a counterbalance to the pressure against the back of such chair, as above described." Now it was perfectly clear upon the evidence that this description applies to *Brown's* chair, though that was encumbered with some additional machinery. The specification, therefore, claimed more than the plaintiff had invented, and would have actually precluded Mr. *Brown* from continuing to make the same chair that he had made before the patentee's discovery. We are far from thinking that the patentee might not have established his title by shewing that a part of *Brown's* chair could have effected that for which the whole was designed. But his claim is not for an improvement upon *Brown's* leverage, but for a leverage so described that the description comprehended *Brown's*. We are therefore of opinion that the patent cannot be sustained, and a nonsuit must be entered.

Rule absolute.

THOMAS *v.* JENKINS.

April 21st.

On an issue as to the boundary of a private estate, a witness having stated that he knew it to be identical with that of a hamlet: —*Held*, that evidence of reputation as to the boundary of the hamlet was admissible to shew the boundary of the private estate.

REPLEVIN, tried before *Coleridge*, J. at the *Swansea* Lent Assizes. The question in issue was the boundary of a certain sheep-walk. A witness for the defendant was asked whether the boundary of the sheep-walk was identical with the boundary of a certain hamlet: he replied that it was. He was then asked what he had heard from old men, now deceased, to be the boundary of the hamlet. The question was objected to, but was admitted by the learned judge, and the defendant obtained a verdict. His lordship, in summing up, told the jury that they must not take the evidence relating to the boundary of the hamlet into consideration, unless satisfied from other evidence that it was identical with that of the sheep-walk.

Chilton now moved for a new trial, on the ground of the improper admission of evidence.—The question at issue being as to the boundary of two private estates, direct evidence of reputation was clearly inadmissible, and the Court will not allow that to be done indirectly which cannot be done directly. The question as to the boundary of the hamlet was not relevant to the issue in the cause. The parties had no kind of notice that it could possibly be inquired into, and therefore were wholly unprepared to meet it. At all events, even if they were prepared, it was concerning a matter wholly collateral, and therefore could not properly be entered upon. The boundary of a private estate also, unlike the boundary of a hamlet, is continually varying, and therefore evidence that the two boundaries were identical at one time, does not even raise a presumption of the continuance of that identity; *Phillips on Evidence* (*a*), *Weeks* v. *Sparke* (*b*), *Doe* v. *Thomas* (*c*), *Richards* v. *Bassett* (*d*), *Talbot* v. *Lewis* (*e*), *Crease* v. *Barrett* (*f*), *Rex* v. *Antrobus* (*g*).

(*a*) Ch. 7, s. 7.
(*b*) 1 M. & S. 679.
(*c*) 14 East, 323.
(*d*) 10 B. & C. 657.
(*e*) 1 C. M. & R. 495.
(*f*) 1 C. M. & R. 919.
(*g*) 2 Ad. & E. 788; 1 Har. & Wol. 96.

King's Bench. THOMAS v. JEFFERIES

Lord DENMAN, C. J.—I have no doubt, notwithstanding what Lord *Ellenborough* is stated to have said in *Weeks* v. *Sparke* (*a*), that reputation is admissible as evidence of a parish boundary. The question is, whether what is certainly good evidence of a parish boundary is admissible in this case, where it is brought forward as a medium of proving boundaries other than those of a parish. I think that when once the fact was proved that these boundaries were identical, any legitimate mode of proving the parish boundary was admissible; and here the witness had previously stated that they were identical. It has been observed, that the boundary of a private estate changes every day, and that the boundary of a hamlet is always the same: of course the evidence can only apply to the period as to which the witness stated the identity to exist. As to that period, I think this evidence admissible just as if either of these parties had sold the estate, defining the boundary to be the same as that of the hamlet.

PATTESON, J.—It is clear that evidence of reputation relative to the boundary of a private farm is not receivable, though it certainly is with reference to the boundary of a parish. It having been once established that the boundaries were identical, how was it possible in this case to exclude the evidence properly applicable to a question of a parish boundary? The jury were expressly told that they were not to take into consideration any evidence to shew what the boundary of the parish was, unless satisfied by the other evidence that the boundaries were identical. If that other evidence had been itself hearsay evidence, then it would properly have been rejected; but it was not so: for the witness first said he knew the fact himself that these particular boundaries were actually identical. Then it became a question for the jury whether they believed that first statement, so as to introduce the second. But having once been properly introduced, the evidence relative to the boundary of the hamlet ought not to have been rejected.

COLERIDGE, J.—The only objection to the first question asked at the trial is, that it was not relevant to the issue to be tried; but that objection cannot be supported after the answer that the boundaries of the sheep-walk and of the hamlet were identical. I cannot admit the doctrine that a party is to be shut out from proving a fact, because it happens to be subsidiary only to the issue to be tried. It is conceded, that if the boundary of the hamlet had been the issue between the parties, that evidence of reputation would have been admissible; and if it be once granted that a fact is relevant, it may be proved in the same way as if it were the actual issue upon the record.

Rule refused.

(*a*) 1 M. & S. 679.

KIERAN *v.* SAUNDERS.

April 21*st.*

Trover. *Plea*, that *A.* was jointly interested with the plaintiff, and that defendant committed the conversion alleged by leave and licence of *A.* *Replication*, that *A.* was not a joint owner with the plaintiff.

At the trial it was proved on the part of the plaintiff, that the property was by the defendant sold to the plaintiff while lying in a warehouse by a sale note, that it was transferred under the direction of the defendant by the warehouseman to the account of the plaintiff, and that payments were made by the plaintiff to the defendant:—*Held*, notwithstanding the issue raised on the pleadings, that the conduct of the defendant estopped him from supporting it by proof that *A.* was jointly interested in the property, and that the alleged conversion was made by his authority.

TROVER for wheat. First *plea*, not guilty; second, that the plaintiff was not possessed *modo et formâ*; third, that at the time when &c., *Luke Marsden* and *Thomas Holyland*, assignees of *John Marsden*, a bankrupt, were joint owners with the plaintiff of the wheat, and that the defendant committed the conversion alleged by leave and licence of *L. M.* and *T. H.* *Replication* to the third plea, that *L. M.* and *T. H.* were not joint owners with the plaintiff *modo et formâ*.

Upon the trial at the *Liverpool* Lent Assizes before *Patteson*, J., it was proved that the wheat, while lying in the warehouse of Messrs. *Booth* and *Walmsley*, agents of the defendant, was sold by him to the plaintiff, and that the plaintiff signed the sale note, which was dated *February*, 1836. In *June*, that year, the defendant gave notice to Messrs. *B.* and *W.* of the sale, and directed them to weigh and transfer the wheat to the account of plaintiff. This was done, and payments were made by the plaintiff to the defendant, and the accounts between them were made up to the 7th *July*, 1836, the wheat continuing to lie in the warehouse of Messrs. *B.* and *W.* In *November*, 1836, plaintiff applied to them for samples, but was refused under the direction of the defendant. The counsel for the defendant then submitted that the plaintiff must be nonsuited, contending that nothing had taken place whereby the property had become vested in the plaintiff, and that there was no proof of any conversion by the defendant. The learned judge was of opinion that the transfer by direction of the defendant had sufficiently vested the property in the plaintiff, and that the refusal of the sample by the warehouseman under direction of the defendant was sufficient evidence of a conversion. The defendant then proposed, in support of the third plea, to offer evidence that he had received a notice in *October*, 1836, from *J. M.*, that the wheat was furnished on the joint account of himself and the plaintiff, and that the defendant was to hold the wheat on his account till further orders; that *J. M.* afterwards became bankrupt, and that the defendant also received notices to the same effect from the provisional assignee, and from *L. M.* and *T. H.*, afterwards appointed assignees of *J. M.* The learned judge was of opinion that no evidence could be received on that plea, the defendant having estopped himself by his conduct. Verdict for the plaintiff, with leave to move to enter a nonsuit, or for a new trial, on the ground that the evidence was improperly rejected.

Alexander now moved accordingly.—By the 3rd plea a direct issue on a material point having been tendered and taken, that issue must be disposed of. There is a distinct averment in the plea that the property of the wheat was in persons other than the plaintiff, and the only point raised by the replication was, whether or not *L. M.* and *T. H.* were joint owners with the plaintiff. The pleadings in their present form would not admit the plaintiff to avail himself of any acts done by the defendants as an estoppel.—[*Patteson*, J.—The form of the pleading can make no difference. If, under the old plea of not guilty, the defendant under the circumstances would have been estopped from showing the property to be in a third person, no doubt he would be estopped now. A party cannot put himself into a better situation

by any form of special pleading than he would have been formerly under the general plea of not guilty.]—The plaintiff ought to have replied the circumstances which amounted to an estoppel.—[*Patteson*, J.—He could not have pleaded the estoppel; it was matter of evidence, as it is in assumpsit.] Parol evidence also was admissible to shew that though the note and invoice were made out in the name of the plaintiff, still the sale was actually made to the plaintiff jointly with others; *Wilson* v. *Hart* (*a*). The defendant had a right to shew that he dealt with the plaintiff thinking him to be the owner, but subsequently found that he was not, *Patterson* v. *Gandasequi* (*b*); and the plaintiff might have then replied, shewing the circumstances which precluded the defendant from setting up such a defence; but having now pleaded a denial of the ownership he must be bound by the consequences of his own pleading.—[*Coleridge*, J.—What the learned judge said was virtually this:—"It is of no use to you to give the evidence proposed, because your own acts destroy the effect of it."]

Lord DENMAN, C. J.—I do not feel any difficulty in the case. The transfer having been made in the usual way of the trade, the whole transaction amounts to this,—that the defendant has sold and delivered this wheat to the plaintiff; another party then comes forward and says that he is entitled to it as a joint owner, but the defendant cannot at that time, after the sale and delivery, contravene his own acts and set up an ownership in a third party.

COLERIDGE, J.—I presume that the defendant's object in tendering this evidence was not merely to have his witnesses heard. Under the circumstances they could not have proved any thing which could have served him. I admit that their evidence might have been conclusive in his favour if there had not been a virtual transfer of the wheat; but after that the defendant was in the condition of a stranger to the property.

PATTESON, J. concurred.

Rule refused.

(*a*) 7 Taunt. 295. (*b*) 15 East, 62.

RANSFORD *v.* COPELAND.

May 5.

A distinct and separate allegation in a plea, that certain persons were a banking company illegally associated, within 3 & 4 *W.* 4, c. 98, is one compounded of fact and law, and therefore traversable. *Secus*, had the plea stated certain facts and then gone on to allege "*whereby* they were illegally associated," or words to that effect.

ASSUMPSIT against the defendant, as acceptor of a bill of exchange. The declaration stated, that the plaintiff was one of the public officers of certain persons united in partnership, carrying on the business of bankers in *England*, under the name of the *Lcamington Bank*, according to the form of the statute, &c. *Plea*, that the said persons so united &c., consisted of more than six persons, and that they were illegally associated together, and carried on the trade &c. for the purpose of borrowing money in *England* on their bills, payable on demand, or at a less time than six months &c., during the continuance of the privilege granted by 3 & 4 *W.* 4, c. 98, to the *Bank of England*, &c. *Replication*, that the said persons &c. were not illegally associated &c., *modo et formâ*.

At the trial at the Spring Assizes at *Warwick*, before Lord *Abinger*, C. B., it was admitted on the part of the plaintiff that the several allegations of fact contained in the plea were true; but it appeared that *Leamington*, where the Company carried on business, exceeded the distance of sixty-five miles from *London*, and it was contended by the plaintiff that the defendant was bound to prove that the Company were in the habit of taking up money on their bills, as alleged in the plea, within that distance, and that otherwise he did not support the allegation in his plea, that the Company were *illegally* associated together. The defendant contended that he was entitled to a verdict on proof of the specific facts alleged in the plea. The learned judge thought that the plaintiff was entitled to a verdict, but gave leave to move to enter a verdict for the defendant, if the Court should be of a different opinion.

G. Hayes moved accordingly.—The defendant was bound to prove nothing more than the specific facts stated in the plea; and though these facts might not afford an answer to the action, yet that would not affect his right to the verdict. The plaintiff perhaps might have demurred to the plea, or he may move in arrest of judgment if a verdict should be entered for the defendant, but that affords no reason why the defendant should be called on to prove more facts than he has alleged. The plea in this case seems to have been framed with reference to the statutes 39 & 40 *Geo.* 3, c. 28; 7 *Geo.* 4, c. 46; and 3 & 4 *W.* 4, c. 98. By the first of these statutes exclusive banking privileges are given to the *Bank of England;* and partnerships of more than six members are prohibited from taking up money on their bills or notes at less than six months' date. By the 7th *Geo.* 4, c. 46, s. 1, banking companies are allowed to take up money on their bills or notes, provided they do not carry on business within sixty-five miles of *London*. By 3 & 4 *W.* 4, c. 98, s. 1 & 2, banking companies are enabled to carry on banking business within sixty-five miles of *London*, provided they do not take up money on their bills or notes payable on demand, or at less than six months, during the continuance of the privileges of the *Bank of England*. The plea may be insufficient for omitting to aver that the Company took up money on their bills or notes within the proscribed distance of sixty-five miles; but the sufficiency of the plea is not now in question, for the plaintiff having traversed it, the only point is, what is put in issue by such traverse. By that nothing is put in issue but the facts specially alleged, and as all were admitted on the trial the defendant was entitled to a verdict. The word "illegally" undoubtedly forms part of the issue, but has not the effect of enlarging it; it is equivalent to the words "wrongfully and injuriously," or "against the form of the statutes," which have no such effect, but which are nothing more than words of inference or conclusion applied to the particular facts stated (*a*). Illegality is a conclusion of law which a jury cannot decide upon, and is therefore not the subject of a traverse. It is a general rule that no traverse can be made of matter of law (*b*). In *Co. Lit.* 303, it is laid down that pleas must be pleaded so as to be capable of trial, and must therefore consist of matters of fact; and therefore a plea that *A. lawfully* enjoyed the goods of felons is bad, for the jury cannot determine whether he lawfully enjoyed (*c*).

(*a*) 1 Wms. Saund. 135, n. 3.
(*b*) 1 Chit. Pl. 612, 6th ed.; 1 Wms. Saund. 23, n. (5).
(*c*) 9 Rep. 25 a.

King's Bench.

RANSFORD v. COPELAND.

In *Peate* v. *Dickens* (*a*) it was held, that the omission of the words *contrà formam statuti*, was immaterial in a plea that the contract in the declaration was made on a *Sunday*. Their presence therefore cannot enlarge the burthen of proof on a plea stating specific facts, and the same must be the case as to the word "illegally." If the plea had stated nothing more than that the Company were illegally associated together, and issue had been joined on it, the jury could not have tried such an issue. Great inconvenience would follow from holding that difficult questions of law may be determined by juries, in consequence of the word "illegally," or other words of a similar purport being introduced in the issue. Juries will often have to find verdicts on questions of fact not stated in the pleadings, and no writ of error will lie in case of mistake.—[*Patteson*, J. referred to actions for a malicious prosecution, where the allegation of want of reasonable or probable cause raised a mixed question of law and fact.]

Cur. adv. vult.

Lord DENMAN, C. J. now delivered the judgment of the Court (*b*).—This was an action on a bill of exchange, brought in the name of one of the public officers of a banking Company, under the 7 *Geo.* 4, c. 46. The defendant pleaded that the Company consisted of more than six, &c.; that they were illegally associated together, and carried on trade for the purpose of borrowing and taking up money on their notes, payable on demand, during the continuance of the privilege granted by the 3 & 4 *Will.* 4, to the Governor and Company of the *Bank of England*. The replication traversed that they were illegally associated, or carried on trade *modo et formâ*. At the trial the defendant proved that the Company did take up money on their notes, payable on demand, and insisted that such proof entitled him to a verdict, inasmuch as the illegality of the association was not put in issue by the replication, being matter of law which is not traversable. The learned judge held, that it was incumbent on the defendant to go further, and prove the trading within sixty-five miles of *London*, (in order to shew the illegality of the association), and for want of such evidence directed a verdict for the plaintiff. It is now admitted that the plea is bad, but contended, as at the trial, that it was proved in fact. The question is, whether the allegation in the plea, that the Company was illegally associated, is an allegation of a mere result of law, or of law and fact mixed. The distinction is obvious; and all the authorities (most of which are referred to in *Lucas* v. *Nickolls* (*c*)) turn upon it. We are clearly of opinion that the allegation in this case is one compounded of law and fact, and therefore traversable. The plea does not state certain facts, and then go on to allege, whereby the association was illegal, or any words to that effect, but contains a distinct and separate allegation "that the said association was illegal, within the statute 3 & 4 *Will.* 4, c. 98." It is plain that if it were so illegal, that illegality must arise from some fact, or the absence of some fact, either of which required to be established by proof; and such proof is necessarily matter for the consideration of a jury. We think that the learned judge was quite right in requiring such proof, and that the verdict must stand.

Rule refused.

(*a*) 1 C. M. & R. 422.
(*b*) Lord *Denman*, C. J., *Littledale*, *Patteson*, and *Coleridge*, Js.
(*c*) 10 Bing. 157.

WEDGE *v.* BERKELEY.

May 1.

A magistrate is entitled to a notice of action under 24 *G.* 2, c. 44, if he has acted *bonâ fide*, believing himself to be in the execution of his duty, although he had no reasonable ground for what he did. The question of *bonâ fides* is for the jury to determine, and if the plaintiff has not desired to have it left to them, *bonâ fides* will be presumed.

TRESPASS. First count, for an assault. Second count, for seizing the plaintiff's goods. *Plea:* general issue. On the trial, before *Littledale*, J. at the *Sussex* Summer Assizes, 1835, it appeared that the defendant was a magistrate, and having met two sons of the plaintiff wheeling a barrow full of grass, after some inquiries said it was stolen, and that he should detain it, and that he did so detain it. At the end of the plaintiff's case it was objected that he must be nonsuited, as no notice of action had been given, pursuant to 24 *Geo.* 2, c. 44, s. 1. The point having been reserved, the defendant called witnesses who proved that the plaintiff said he should detain the grass as a magistrate, and that he sent it back to the plaintiff's house the same evening. The first count was abandoned; as to the second, the learned judge left it to the jury to say, whether the defendant had reasonable ground to suspect that the property had been stolen. He was not required to ask the jury, whether or not the defendant had acted *bonâ fide*. Verdict for the plaintiff, with liberty to move to enter a nonsuit, on the ground of the want of notice. In *Michaelmas* term, 1835, a rule *nisi* was obtained by *Platt*; against which

C. R. Turner now shewed cause.—The intention of the statute was to protect magistrates solely where they commit some error, while acting in the ordinary exercise of their duty. Here the defendant was not so acting. It is no part of the duty of a magistrate himself to apprehend a person on his own suspicion or his own view only. If he do so, he acts at his peril, and is no more protected than a private individual who must shew that his suspicions are correct; or at most, than a constable, who must shew reasonable ground for them (*a*). Here there was total absence of all actual authority, and the jury have negatived the existence of reasonable ground for suspicion. The defendant had not even any reasonable ground for supposing that the thing done by him was done in the execution of his duty as a magistrate; he was not, therefore, entitled to notice; *Cooke* v. *Lconard* (*b*) and *James* v. *Saunders* (*c*).—[*Littledale*, J.—The verdict may be for the plaintiff, because the defendant had no reasonable grounds for suspicion; but still it is another question, whether he is not entitled to notice. The right to a verdict, and the right to a notice of action, are not convertible terms.]—Here the defendant has put himself without the statute, the object of which was to protect the magistrates only in case of actions brought against them for "small and involuntary errors in their proceedings."—[*Patteson*, J.—If the verdict had been found for the defendant, I think that would have shewn, not only that he ought to have had notice, but also that he was justified in what he did.]

Platt, *contrà*.—If, upon the evidence, there were any doubt whether the defendant acted *bonâ fide* or not, the plaintiff should have requested the judge to leave that question to the jury; and as it was not left to the jury,

(*a*) Hawk. P. C. book 2, c. 13; Hale, P. C. tit. *Arrest*.
(*b*) 6 B. & C. 531.
(*c*) 10 Bing. 429.

it must now be assumed that the defendant did act *bonâ fide*. *James* v. *Saunders* (*a*) therefore becomes an authority against the plaintiff, for although the Court in that case held the defendant was not entitled to notice, their judgment was put upon the ground that he had *not* acted *bonâ fide*, and it seemed to be there taken for granted that he would have had a right to notice if he had acted *bonâ fide*. *Cooke* v. *Clark* (*b*), *Hopkins* v. *Crowe* (*c*), and *Staight* v. *Gee* (*d*), are to the same effect. The last is a decision as to the proper venue under 21 *Jac.* 1, c. 12; but wherever that statute operates, the 24 *Geo.* 2, c. 44, also applies. If a magistrate act upon reasonable grounds, that is a sufficient defence of itself, without the immunity given by the statute; the only object of notice is, that a magistrate who has done wrong may tender amends. Where there are reasonable grounds, he has not done wrong, and therefore no amends are necessary.

Lord Denman, C. J.—The question is, whether the defendant, who has been sued on account of that which he says he did in his character of magistrate, was entitled to notice of action. (His lordship then stated the circumstances of the case.) There is no doubt that he was so entitled, if what he did was done, according to his belief, in the execution of his duty; and supposing that he acted not merely in the full belief that this property seized by him had been stolen, but even if he had reasonable ground for suspecting it to have been stolen, he would have been entitled to a verdict. The jury indeed have found that he had no reasonable ground for suspicion; but the other question still remains, whether he did not make this seizure according to his belief in the execution of his duty, and I am of opinion that he did so make it, if he really believed that a felony had been committed. It seems that at the close of the plaintiff's case the defendant applied to have the plaintiff nonsuited, on the ground that no notice had been given, and the point was reserved. The defendant then called witnesses, and the question of reasonable ground went to the jury; but still the question, whether the defendant was entitled to notice, as having acted according to his belief in the execution of his office, was left undetermined. That depends upon whether he acted *bonâ fide*. If he did not so act, but was moved by ill-will, then the plaintiff might have offered evidence of this, and the jury would have decided as to the *bona fides* also. If they had decided in the negative, that would have determined that there had never been any necessity for a notice. But under the present circumstances, I think that the defendant, in the absence of proof to the contrary, must be presumed to have acted *bonâ fide*, and that he was entitled to notice. The rule for a nonsuit, therefore, must be made absolute.

Littledale, J.—I am of the same opinion. The verdict may have been given against the defendant, on the ground that he had no reasonable or probable cause for the act done, still that does not decide the question, whether he is entitled to have notice given before the action is brought. If it had been proved here that the defendant was acting with *malâ fides* or vindictively, then it might have been taken that he made use of his office for

(*a*) 10 Bing. 429.
(*b*) 10 Bing. 19.
(*c*) 7 C. & P. 373.
(*d*) 2 Stark. N. P. 445; and see also *Ballinger* v. *Ferris*, 2 Gale, 111.

the purpose of doing an injury, and that the circumstance of his being a magistrate was only employed as a pretence, and in such case no notice would have been necessary. (His lordship then stated the facts of the case.) But there does not appear to have been any ill-will existing on the part of defendant, and therefore I cannot but assume that he acted *bonâ fide*, and that being the case, I think he was entitled to a notice.

PATTESON, J.—There are two questions in this case; first, whether the defendant acted *bonâ fide* in the execution of his duty; and second, whether he had reasonable grounds for supposing that a felony had been committed. The first question was certainly not put to the jury, but if there are circumstances in any case bearing against a magistrate, which lead to a question, whether he has acted *bonâ fide*, that question is for the jury to determine. It was so held in *James* v. *Saunders* (*a*), and in other cases. Now here it appears that the defendants applied to have the plaintiff nonsuited because no notice had been given. It does not appear that upon such application the plaintiff said you are entitled to notice if you acted *bonâ fide*, but I mean to dispute that fact, and it is a question for the jury to decide. We must, therefore, assume that the defendant did act *bonâ fide*, and if so, then the case falls within the provisions of the act of 24 *Geo. 2.* In most cases, questions of *bona fides* are not put to the jury, because, generally speaking, it is admitted; but whenever it is disputed, it is for them to determine. As to the other question, the jury negatived the existenceof reasonable grounds. The defendant therefore was not entitled to a verdict; but still the question remains untouched as to the *bona fides*, which we must presume in favour of the plaintiff.

COLERIDGE, J.—The distinction is clear between that which amounts to a defence, and that which entitles a party to notice. A party may be entitled to notice, where he has no defence upon the merits; where, although he may have taken upon himself too much, still he has acted *bonâ fide*, that is, believed that he was acting within the limits of his authority. Here I cannot help thinking that the *bona fides* was taken for granted, otherwise, why was it not left to the jury, as it would have been if the plaintiff had desired it? That having not been done, we must now give the defendant the benefit of every presumption in his favour.

Rule absolute.

(*a*) 10 Bing. 429.

DAVIS *v.* CHAPMAN.

May 5th.

In an action against the marshal of the K. B. prison for an escape, a judge's order having been obtained for the particulars of the time and place of the alleged escape, the Court discharged, with costs, a rule to rescind this order.

ACTION against the Marshal of the *King's Bench* prison for an escape. The defendant having obtained an order of Lord *Denman*, C. J. for an account "in writing of the particulars of the alleged escape or escapes, for which this action is brought, specifying the time and place, &c." which *Mansell*, this term, had obtained a rule nisi to set aside,

King's Bench.
DAVIS v. CHAPMAN.

Sir *J. Campbell*, A. G. now shewed cause.—The practice has always been to inform the marshal of the particulars of the escape, on which the plaintiff relies. This practice is reasonable, and indeed necessary, for otherwise where the debtor has been allowed the enjoyment of the rules, the defendant not being cognisant of the escape alleged, would have great difficulty in preparing his defence. It has been decided that the marshal is entitled to particulars, *Webster* v. *Jones* (*a*); at all events, this Court will not control the discretion which has already been exercised by a judge at chambers.

Manuell, contrà.—Before the New Rules, the plaintiff might have had several counts in his declaration for a single escape; as he is now confined to one count, he ought at least to be allowed in it the use of general terms. This order cannot stand in its present terms, which require a specification of time and place; but in the case referred to, *Abbott*, C. J. says, that it is not necessary to give the precise day.—[Lord *Denman*, C. J.—It never has been held necessary to observe the precise terms of the order.]

LITTLEDALE, J.—The plaintiff, under an order like the present, is only bound to give the best particulars in his power, and if the defendant is not satisfied with such particulars, he must apply for another order. There is no ground whatever for rescinding this order.

PATTESON, J. concurred.

COLERIDGE, J.—I think that this order is not only right in substance, but in form also. I think that the defendant, if he is able to do so, is bound to give the precise day and time when the escape occurred.

Lord DENMAN, C. J. concurred.

Rule discharged, with costs.

(*a*) 7 Dowl. & Ryl. 774.

CLARE *v.* MAYNARD.

April 21*st.*

Action for breach of warranty of a horse. The declaration stated as special damage the expenses incurred for examining the horse, and that the plaintiff having resold the horse for a higher price, it was, on discovery of the unsoundness, returned to him, and that he lost all the advantage of the resale. There was no averment that the higher price was obtained by reason of any expense, labour, or skill bestowed by the plaintiff; nor did the plaintiff desire it to be put to the jury, whether the horse, at the time he bought it, was actually worth the higher price.

Held, that he was not entitled to recover the difference between the price paid and the price for which the horse was resold by him, and that under no circumstances could he recover the expenses incurred by examining the horse.

Quære, if he would have been entitled to recover the difference, had the jury found that the horse was actually worth the higher price at the time of the first sale.

ACTION on the warranty of a horse. The declaration averred expenses incurred for the keep &c., also for the examination of the horse by a veterinary surgeon to ascertain whether it was unsound; and also that the plaintiff having paid to the defendant *45l.* for the horse, sold it for *55l.* to one *Collins*, who, on discovery of the unsoundness, returned it to the plaintiff; whereupon he was obliged to repay that sum and the expenses incurred

by *Collins*, and afterwards sold the horse by auction for 17*l.* 14*s.* 6*d.*, whereby he lost all the advantage, benefit, and profit he would have derived from the resale. The defendant paid 39*l.* 4*s.* into Court as full satisfaction; to which the plaintiff replied, damages *ultra*.

At the trial before Lord *Denman*, C. J. at the *London* sittings after last term, it appeared that the sum paid by the plaintiff to the defendant for the horse was 45*l.*, and that the expenses incurred at the stable were 6*l.* 16*s.*, and that the horse had been sold to *Collins* as stated, returned, and afterwards sold by auction for 17*l.* 14*s.* 6*d.* No proof was offered by the plaintiff of the value of the horse at the time when he purchased it from the defendant, nor of any sums that the plaintiff had expended on the horse. Claim was made for certain sums paid to a veterinary surgeon for examining the horse, and also for certain expenses incurred by taking legal advice previous to the action. His Lordship was of opinion that these claims could not be allowed, and directed the jury to estimate the damages by allowing the expense incurred for the keep &c., and the difference between the 45*l.* paid for the horse and the 17*l.* 14*s.* 6*d.* for which it was sold. The jury being of opinion that the sum paid covered these damages, found a verdict for the defendant.

M. D. Hill now moved for a new trial, on the ground of misdirection.—The plaintiff was entitled to recover the difference between the 45*l.* and the 55*l.*, whether that be considered as profit lost upon a contract which was actually made, or mere remuneration for the various expenses incurred and skill expended in bringing up the horse and preparing him for sale. At all events, the plaintiff is a loser to that amount by reason of the horse proving unsound; and it is mentioned in the declaration as special damage.

Lord DENMAN, C. J.—The declaration stated by way of special damage, that the plaintiff sold the horse to *Collins* for the sum of 55*l.*, being an advance of 10*l.* upon the 45*l.* which he had given for it, and that he was obliged to give up the bargain and take back the horse in consequence of a breach of the warranty. If the claim for this sum of 10*l.* had been insisted on at the trial I should have told the jury, according to the view I took of the case of *Cox* v. *Walker* (*a*), that it was for them to say whether the value of the horse actually was 55*l.* at the time of sale for 45*l.* The jury would then have said whether it was so or not, and the Court would have determined whether the damages had been properly estimated. That claim, however, was then virtually given up; and the claim now takes another shape. The plaintiff says, he is entitled to a certain sum for incidental expenses, amounting to 10*l.*, which is exactly the difference between the one price and the other. It is clear that this is nothing more than another mode of making a claim that has been disallowed once before. It is still a claim for the supposed loss of a bargain. On this ground there can be no doubt that he is not entitled to damages.

PATTESON, J.—The question does not here arise, whether a party is entitled to recover expenses incurred by him in order to improve an article

(*a*) This case stood for judgment in this Court, but an arrangement having been made between the parties no judgment will be given.

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purchased for a certain sum, which afterwards he sells, but is obliged to take back. The declaration states as special damage the difference between the 55*l.* for which the plaintiff sold the horse, and the 45*l.* for which he bought it. There is no statement that the difference was laid out upon the horse, and its value thereby increased. It is a simple allegation, that the horse was bought for 45*l.* and afterwards sold for 55*l.* Upon this declaration the plaintiff cannot be entitled to recover the difference. Whether it could be recovered, supposing it to have been averred and proved to have been laid out upon the horse, it is not necessary for me to give an opinion.

COLERIDGE, J.—I found my opinion upon the facts stated in the record. It there appears that the plaintiff bought the horse for 45*l.*, expenses were incurred, and he then sold it for 55*l.* He now contends that he is entitled to recover the difference between the two sums. It is not alleged as special damage, that he had laid out money, and that in consequence of the breach of the warranty he lost that money, nor that the difference in the price was in consequence of money laid out; it is only stated that the horse was bought for so much and sold for so much. The plaintiff now seeks to recover 10*l.*, being the difference between the two prices put simply and dryly as the loss of a bargain. This he is not entitled to recover.

Rule refused.

May 3rd.

A prescription whereby the occupier of *B.* claimed to have the sole and exclusive right of pasture and feeding of sheep and lambs in and upon &c., as to *B.* belonging and appertaining:—*Held*, only to entitle the occupier of *B.* to depasture &c. with sheep and lambs *levant* and *couchant* on *B.*

2. That the depasturing the locus in quo by the occupier of *B.* with sheep and lambs not his own property, but taken in "on tack," was properly characterised by the judge at the trial as a usurpation in itself, and not evidence of any right to depasture the locus in quo with such sheep and lambs, although admissible as evidence in support of the alleged prescription.

JONES *v.* RICHARDS and others.

REPLEVIN. The only question in this case arose upon a cognisance made by the defendants as bailiffs of *E. D.*, the occupier of *Blaenmeryn*, of the taking the plaintiff's cattle as a distress under a prescription, whereby the occupier of *Blaenmeryn* claimed to have *the sole and exclusive right of pasture and feeding of sheep and lambs* in and upon the *locus in quo, belonging and appertaining to Blaenmeryn*. The plaintiff traversed this right, and issue was thereupon joined. At the trial before *Coleridge*, J. at the Lent Assizes, at *Cardigan*, the defendants, in support of the right claimed, gave in evidence the fact, that for many years the occupiers of *Blaenmeryn* had depastured the *locus in quo* with sheep and lambs, the property of others, which had been taken in "on tack" by them and also by the defendants; and that the plaintiff, though he knew all these facts, had offered no opposition to their so doing. The learned judge, in summing up, told the jury, that in his opinion the depasturing the locus in quo by the sheep of others taken in on tack was a usurpation on the part of the defendants, but that still he considered it as evidence to shew the existence of the right prescribed. Verdict for the plaintiff.

Chilton, in this term (*a*), moved for a new trial, on the ground of misdirection. —The learned judge ought to have left it to the jury, that the depasturing on the locus in quo of these sheep and lambs taken in "on tack" was the exercise of a legitimate right. There was nothing in the terms of the prescription to raise a presumption that what had been done amounted to a usurpation. The prescription only limited the exercise of the right claimed to the occupier of *Blaenmeryn*. There was nothing in it which restricted him to the user of it

(*a*) *April* 21, *coram* Lord *Denman*, C. J., *Patteson* and *Coleridge*, Js.

by sheep and lambs, being his own property, or *levant* and *couchant* on *Blaenmeryn*; therefore, whether or not they were so was perfectly immaterial; and as what had been done was within the knowledge of, and unopposed by the plaintiff, it established a right to the pasturage in the manner in which it had been exercised.

Cur. adv. vult.

Lord DENMAN, C. J. now delivered the judgment of the Court.—In this case Mr. *Chilton* moved for a rule for a new trial on several grounds (*a*), which we disposed of on the motion, and we took time to consider the following. The issue on which the cause turned was, whether the defendant *Richards*, occupier of a farm called *Blaenmeryn*, was entitled to the sole exclusive right of pasture and feeding of sheep and lambs on the *locus in quo*, as appertaining to that farm. In support of this right, the defendant on the trial gave important evidence of feeding the sheep of other persons, which he had taken in on tack; and the learned judge, commenting upon this evidence in his summing up, stated to the jury, that although they ought not to dismiss it from their consideration, because, whether lawful or not, it might be very cogent to prove the existence of the right claimed, yet it did not appear to him that it could properly be considered as done in the exercise of that right; that even if the right existed, the tacking appeared to him to be a usurpation upon the lord's grant; for as that extended only to the exclusive feeding of sheep and lambs by the occupier of *Blaenmeryn*, as appertaining to his farm of *Blaenmeryn*, the lord had reserved to himself all other modes of enjoying the produce of the land, and was entitled to eat by the mouths of beasts or horses whatever the sheep and lambs on *Blaenmeryn* did not consume. It was contended, and we think with justice, that this mode of characterising the evidence was calculated to weaken its due effect upon the jury, if it were entitled to be considered as a lawful mode of exercising the right; and the question, therefore, which we desired to consider was, whether the learned judge was correct in the construction which he put upon the right claimed in this record, and we are of opinion that he was.

The prescription alleged in this case is of so unusual a kind, that no decision precisely in point was mentioned in moving for the rule, nor have we upon search found any. But several cases, in which the Courts have had to consider claims to common by custom or prescription, furnish principles on which we may safely decide this. We refer to *Potter* v. *North* (*b*), *Hoskins* v. *Robins* (*c*), and the cases collected in the notes there. The principle seems to be to ascertain the extent of the rights conferred and the rights reserved by the grant, and to see whether the act be in derogation of the latter. By the terms of this prescription the grantee's right is limited to the feeding of sheep and lambs. This would be wholly insensible if the entire pasturage were granted to him in exclusion of the lord. Further, the right to feed by sheep is not limited by number, so as to make it indifferent to the lord by whose sheep the pasturage is enjoyed, but it is a grant to the occupier of *Blaenmeryn*, and is appurtenant to that farm. Some interest in the pasturage therefore being reserved to the lord, the questions are, what is that interest, and is the tacking relied on in derogation of it? It appears to us

(*a*) That the verdict was against evidence.
(*b*) 1 Wms. Saund. 350.
(*c*) 2 Wms. Saund. 324.

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the most reasonable conclusion from the premises, that the lord's interest is in the consuming by the mouths of his cattle and horses whatever is not required for the sheep and lambs *levant* and *couchant* on *Blaenmeryn*. The appurtenancy to a particular farm is not in itself equivalent to levancy and couchancy, nor do we rely on it as such. Our conclusion is drawn from the language of the whole prescription, and upon this it appears to us that the tacking of the sheep is injurious to such right. The evidence in the cause we may mention served to shew the reasonableness of the grant thus construed. It appeared, on the one hand, to be favourable for the sheep and convenient to the owner to have the exclusive enjoyment of certain spots at certain seasons of the year; and, on the other, that there was, beyond that which was required for the sheep, profitable pasture for cattle. There will, therefore, be no rule.

Rule refused.

The Emperor of BRAZIL *v.* ROBINSON.

May 8th.

A foreign sovereign who resides abroad is liable as plaintiff in an action to find security for costs.

ACTION on a charter-party. The plaintiff resides in *South America*.

W. H. Watson having obtained a rule nisi calling upon the plaintiff to find security for costs,

Martin now shewed cause. In the case of the *Duke de Montellano* v. *Christin* (*a*) a similar application was refused, on the ground that the plaintiff being an ambassador, it would not be respectful towards his sovereign to exact such a security. That reason applies with greater force in the present case, particularly since no special reason is set out to shew that such an application is necessary.

Watson, contrà. The ground on which the Court acted in the case cited was, that the ambassador was resident in this country.

Per Curiam.—The plaintiff here resides abroad, and there is nothing to distinguish him from any other suitor.

Rule absolute.

(*a*) 5 M. & S. 503.

KITCHEN *v.* SHAW.

May 5th.

Under 6 *Geo.* 3, c. 25, justices of the peace have no jurisdiction to interfere on occasion of disputes between masters and domestic servants relative to their contracts of hiring.

ACTION for false imprisonment. Plea: the general issue. At the trial before Lord *Abinger*, C. B. at the Summer Assizes, 1835, at *Carlisle*, his lordship, after hearing the case stated by the plaintiff's counsel, directed a nonsuit.

Cresswell in the ensuing *Michaelmas* term obtained a rule nisi to set aside the nonsuit and for a new trial; against which

Coltman, in *Hilary* term, 1837, shewed cause.

Cresswell was heard in support of the rule. The facts and arguments sufficiently appear in the judgment.

Cur. adv. vult.

Lord DENMAN, C. J. now delivered the judgment of the Court.

This was an action for false imprisonment. Lord *Abinger* nonsuited on the opening of the case by the plaintiff's counsel, from which it appeared that she, being an infant, complained of the defendant, a justice of the peace, for convicting her under 6 *Geo.* 3, c. 25, s. 3, for not performing her contract with a master to whom she had hired herself as a domestic servant. A new trial was moved for, and the rule granted, on the ground that to this class of servants the act did not apply; and, secondly, supposing it to apply, the plaintiff's infancy was said to prevent her from entering into a contract of service. We find it unnecessary to give any opinion on the question of infancy, because we are clearly of opinion, on the first objection, that the defendant had no jurisdiction. The 5th of *Elizabeth* is not only confined to certain classes of servants, but it expressly excludes domestic servants. The eleventh negative qualifiction in sect. 4, is thus worded, "not being lawfully retained in the household, or in any office with any nobleman, gentleman or others, according to the laws of this realm." If any statute *in pari materiâ* had been designed to do away this limitation, one should naturally expect that this would have been effected by plain words. Now the statute 6 *Geo.* 3, c. 25, intituled "An Act for better regulating Apprentices and Persons working under Contract," is introduced by no general preamble. The first clause applies a remedy to the evil therein recited—the injustice practised on several manufacturers in this kingdom by apprentices, who leave their service as soon as they become useful in it. The preamble of the 4th section is thus worded: "And whereas it frequently happens that artificers, calico-printers, handicraftsmen, miners, colliers, keelmen, pitmen, glassmen, potters, labourers *and others*, who contract with persons for certain terms, do leave their respective services before the terms of their contracts are fulfilled, to the great disappointment and loss of the persons with whom they so contract; for remedy whereof be it enacted, that if any artificer (followed by the same list as before) *or other person* shall contract with *any person or persons whatsoever* for any time or times whatsoever." Large as these words undoubtedly are, when we apply to them the ordinary rules for construing acts of parliament laid down by Mr. *Dwarris* (*a*), and acted upon in all times, but nowhere more clearly stated than by Lord *Tenterden* in *Sandiman* v. *Breach* (*b*), we find ourselves compelled to say that the "*other persons*" are not all persons who enter into engagements to serve for stated periods, but persons of the same description as those before enumerated, and that the generality of the words must have been so restricted, even though domestic servants had not been excepted from the 5th of *Elizabeth*. In the argument, many cases were cited, among others, *Gray* v. *Cookson* (*c*), *Lowther* v. *Lord Radnor* (*d*), *Hardy*

(*a*) Part 2d, 736, 750.
(*b*) 7 B. & C. 96.
(*c*) 16 East, 13.
(*d*) 8 East, 113.

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v. *Ryle* (*a*), properly, because they are connected with the subject-matter, but not now requiring particular examination, because they have no bearing on this point. We may add, that the general opinion has been in conformity with our present decision, and that the treatises have so considered it. We conclude then that the defendant has acted without jurisdiction, and the plaintiff ought to have been permitted to prove her case. The rule for setting aside the nonsuit and granting a new trial must be absolute.

Rule absolute.

(*a*) 9 B. & C. 603.

GLAHOLME *v.* ROWNTREE and another.

May 3*d.*

Debt on a judgment against *R.* and *M.* as executors of *C.* Plea, *plenè administravit præter*, &c. Replication, traversing the *plenè administravit*. At the trial it appeared that *C.* being indebted to *R.*, deposited with him, as security for the money advanced, a life insurance policy, and communicated to the insurance company that he had transferred his interest in the policy to *R.*, of which they made a minute in their books.

C. afterwards appointed *R* and *M.* his executors, and died without making a formal assignment of the policy. The insurance company having refused to pay the proceeds of the policy without a receipt from the executors of *C.*, they signed one as executors. *R.* at the same time delivered a protest, stating that he had done so only to obtain the money, and that he did not thereby compromise his own claim:—*Held*, that *R.* had a lien upon, and was entitled to appropriate the proceeds to the payment of his claim.

ACTION of debt against the defendants, as executors, on a judgment obtained by the plaintiff against *Clarke* their testator. Plea: *Plenè administravit*, except as to 4*l.* 6*s.* 3*d.* Replication, traversing the *plenè administravit*. At the trial before *Tindal*, C. J. at the *Newcastle* Summer Assizes, 1835, it appeared that in 1833 the testator, being indebted to *Rowntree*, deposited with him a life insurance policy for 200*l.* as a security, but refused to execute a formal assignment of it. He afterwards made his will, constituting *Rowntree* and the other defendant his executors, and wrote a letter to the directors of the insurance company, informing them that he had transferred his interest in the policy to *Rowntree*; of which transfer they made a minute in their books. In 1834 testator died without having executed any assignment of the policy, and on the company refusing to pay its amount to any other than his executors, the defendants eventually signed a receipt for it in that character; *Rowntree* at the same time delivering a protest, which stated that he only signed in that character for the purpose of satisfying the directors, and that he did not thereby compromise his own individual claim upon the money. The debt to *Rowntree* amounted to 186*l.*; funeral expenses and probate 6*l.* 10*s.* 2*d.*; journey to *Durham* and other expenses in procuring payment of the policy 3*l.* 3*s.* 5*d.* Verdict for the plaintiff, with leave to move to enter a nonsuit.

Cresswell in *Michaelmas* term, 1835, having obtained a rule accordingly,

Alexander and *Bliss* now shewed cause. *Hawkins* v. *Lawse* (*b*), and all the earlier cases, proceed upon a case in the Year Books (*c*), in which the party was held to have a right on the ground of retainer. The doctrine of retainer can only apply as between debts of the same degree; those cases are not authorities therefore in favour of the present defendants against the plaintiff, who is a judgment creditor; and a new principle will be established if the defendant be allowed to retain, in opposition to a creditor of a superior degree (*d*). There are only three grounds on which the defendant *Rowntree* can claim the proceeds of this policy: on the ground of retainer, which has been al-

(*b*) 1 Leonard, 154. See Wms. Executors, 1015, where the cases are collected (2).

(*c*) 20 *Hen.* 7, 5, 12, 14, pp. 2, 4.

(*d*) Viner's Abr. tit. Executor, (L. a) (M. a) (M. a 2).

ready disposed of; as assignee; or, lastly, as pawnee. He cannot claim as assignee, because the policy being a *chose in action*, no assignment of it could be made; nor as pawnee, because having treated the policy as the goods of the testator, at the time when he obtained its payment, he cannot now set up a different claim to it on the ground of lien; *Boardman* v. *Sill* (*a*); and indeed he relinquished his lien when he signed the receipt as executor; *Jacobs* v. *Latour* (*b*). In that receipt the co-executor joined, and it cannot be said that the possession of *A.* in his own right is the same as the possession of *A.* and *B.* in the right of *C.* But, in truth, he had no lien on the fruits of the policy. The materials of the instrument only were in his possession; they would at best give him a mere *equitable* lien, which cannot be set up against the present legal right of the plaintiff. Then the signature of the receipt by the defendants as executors is an admission of assets in the most conclusive form, and they cannot now disaffirm their own acts, whatever those acts may have been; *Childs* v. *Monins* (*c*), *Quick* v. *Staines* (*d*). [*Patteson*, J. Suppose *Rowntree* had not been executor, could he not have compelled the existing executor to obtain the amount of the policy in order to satisfy his debt? or if the executor, having obtained the whole, paid *Rowntree* his claim upon his giving up the policy, would the whole be assets?] The plaintiff was at all events entitled to a verdict to the amount of the expenses of a journey to *Durham*, and of obtaining the policy, since they must have been incurred by *Rowntree* on his own behalf, and the amount therefore could not be retained by him as executor.

Cresswell, contrà. The point as to these sums was not made at the trial, nor was it reserved. (He was then stopped by the Court.)

Lord DENMAN, C. J. (after stating the facts of the case.)—Since we are relieved from the necessity of considering the point last raised, the question is, whether the other creditors are so to take advantage of the receipt given by *Rowntree* as executor, as to divest the property that was in him as a creditor, and divide it among themselves. I see no reason in law or justice which entitles them to do so. In the case which has been cited from the Year Books, I think that the word "retain" must not be construed to mean retain as executor, but that the executor having become a purchaser was therefore entitled to keep in that character. That case therefore affords no argument in favour of the plaintiff.

LITTLEDALE, J.—It seems to me that *Rowntree* has a right to apply this money in discharge of the debt due to him. I cannot consider what he did as a retainer by him in the character of executor. (His lordship then stated the facts.) Though this policy, at the time of the death of the testator, was legal assets, or rather something preparatory to legal assets, still there can be no doubt that *Rowntree*, or any person to whom the testator was indebted, and with whom he had deposited the policy, had a legal lien upon it. It is said that he had a mere equitable interest, because the policy had not been regularly assigned. That circumstance makes no difference. The deposit

(*a*) 1 Campb. 410, in note to *Attersol* v. *Briant*.
(*b*) 5 Bing. 130.
(*c*) 2 Brod. & Bing. 460.
(*d*) 1 Bos. & Pul. 293.

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of the policy as a security for a debt due by the testator would give a legal interest as much as a formal assignment. Now suppose that the policy had been pledged, not with *Rowntree*, but with some other creditor. The insurance office, before payment, would have required a receipt to be given both by the creditor and by the executor, in order to be discharged from their liability to both. The money would then have been paid over, the creditor receiving 186*l.*, and the executor 14*l.* Now what difference can it make in any point of view, equitable or legal, whether *Rowntree* the executor, or a perfect stranger, is the creditor? The money never could have been obtained by the executor, but with the consent of the creditor, and if, on the occasion of any disputes, a bill in equity had been filed, the Court would have desired this 186*l.* to be paid to the creditor. The same result has followed from the direct payment of this money by the office to *Rowntree*. But it is said that *Rowntree* gave the discharge as executor. No doubt he did so, but such a form of discharge does not deprive him of that which he claimed at first in his own right, and afterwards gave an acquittance for as executor, only because he could not otherwise obtain it. He signed under protest, and therefore must be taken to have received the money as creditor, although he did sign the receipt as executor.

PATTESON, J.—It is said that the defendant had no lien upon the produce of this policy, but only upon the paper upon which it was written. That is a doctrine I do not understand. Would any one argue, that where a bond has been pledged, the pawnee has a lien on the parchment only? The question then is, whether *Rowntree*, having been appointed executor by the person who made the deposit, and having given a receipt for the proceeds as executor, is to lose the benefit of his lien? It is said that as there was no legal assignment or instrument of transfer that would enable *Rowntree* to get the money from the insurance office, and as therefore he was obliged to get it as executor, that he is estopped from saying that it belonged to him as pledgee. That however, at all events, does not apply to the other defendant. He has merely given in a receipt to the insurance office, in order to enable the person who held the policy in his hands to have the benefit of his lien, and the estate of the testator to have the surplus. However, it appears to me perfectly clear that the proceeds of this property, so far as the lien extended, were never assets in the hands of either of these defendants, and I know not why it should be said that this is a new doctrine. It seems to me to be entirely consistent with the principle laid down in the case cited. The fallacy of the argument consists in treating the word "retain" as necessarily meaning retaining in the character of executor, out of the assets of the testator. My lord has already said that it has not necessarily any such meaning. It merely means "to keep." And it is plain that is so. The meaning is, that if an executor has a lien upon a thing by reason of having paid a sum of money, he is entitled to have the thing pledged, to retain the identical thing as his own goods, and he shall not be called on to administer as to it; not that he is to retain it out of the assets, as part of the assets, *qua* executor. Here the executors went to the office, who were debtors of the testator, because, as there was no actual assignment by deed, it was necessary that the executors should go there to be the hands to receive the money. But they only would receive as the mere conduit pipes, if I may so say, of *Rowntree;*

and the circumstance that he happened to be one can make no difference in principle.

COLERIDGE, J.—It would be a great disgrace to our law if the form which *Rowntree* was obliged to go through to make the pledge available were so to operate as to make him liable to the estate for the whole amount he received. If you suppose the creditor to have been a stranger, all difficulty is removed. *Rowntree* can only be liable for what the property is worth when it comes into his hands for the purpose of distribution, and it is worth the surplus only after payment of his debt. It is as if *Rowntree* had been divided into two persons—*Rowntree* the creditor, and *Rowntree* the executor.

Rule absolute (*a*).

(*a*) And see *Heane* v. *Rogers*, 9 B. & C. 575; *S. C.* 4 Man. & Ry. 486, and the cases there cited; *Inglis* v. *Spence*, 1 C. M. & R. 432; *The Stratford and Moreton Railway* v. *Straton*, 2 B. & Ad. 518; *Gourer* v. *Rey*, 3 B. & Ad. 313, &c.

MOUNSEY *v.* DAWSON and another.

May 5th.

1. The Statute of *Marlbridge* (52 *H.* 3, c. 21,) does not empower the sheriff of the county to replevy goods within a liberty, having prescriptive right to grant replevins, until after a demand has been made on the bailiff of the liberty to replevy, and a refusal by him to comply with the demand.

2. In an action on the case for selling goods after they have been replevied, the declaration should aver notice to the defendant of the replevin.

CASE for a wrongful distress. The fourth count was for distraining the goods of the plaintiff, and for detaining and selling them after replevin granted by the sheriff of *Cumberland*. The second plea to this count stated, that the land on which the distress was taken was part of the land of *Derwent Fells*, which is parcel of the lordship and honor of *Cockermouth*, of which the Earl of *Egremont* is seised in fee, who is also lord of the manor of *Derwent Fells*, and that the earl has an immemorial right, without the interruption, columny, or impediment of our lord the king, to have cognisance of pleas and plaints in replevins in the courts of the respective manors and lordships there to be holden, from three weeks to three weeks, by plaints in the said courts to be instituted, and upon such plaints to replevy and to grant deliverance of goods or cattle wrongfully taken as a distress within the said honor, whereof complaint has been made in the said courts that such goods and cattle have been wrongfully detained, in like manner as the sheriff of the county had in his county before the *52 Hen.* 3; and that no sheriff or other officer of the king may enter within the precinct or honor of the lordship, to perform any office or execution there, except in default of the bailiffs there, and that by writ of *non omittas:* that a court baron of the manor of *Derwent Fells* has been held immemorially from three weeks to three weeks, at which plaints in replevin may be instituted; by means whereof, the right of granting replevins belongs to the earl, who has not made any default of replevin: that the sheriff of the county did not require the earl or his steward to replevy the goods; and that the goods and chattels were not replevied by any authority, except by the sheriff, out of his county court; wherefore the defendants sold the goods which had been lawfully distrained.

Replication, admitting so much of this plea as alleged the seisin of the earl; to the residue of it, *de injuriâ.*

At the trial before Lord *Abinger*, C. B. at the *Cumberland* Summer Assizes, a verdict was found for the defendant on all the issues, but nominal

damages were contingently assessed for the plaintiff, in the event of the Court entering judgment for him, notwithstanding the verdict, on the ground of the above plea being insufficient, as not shewing any such exclusive franchise as would properly oust the jurisdiction of the sheriff to grant the replevin. *R. Alexander* having obtained a rule *nisi* ont his point in *Michaelmas* term, 1835,

Cresswell and *W. H. Watson*, in *Hilary* term last (*a*) (*January* 20th), shewed cause.—This plea is good. The question is, whether the sheriff had any right, unless by consent of the lord, or in default of his bailiff, to grant replevin of goods taken within the manor. At common law the sheriff had no jurisdiction to grant replevins except in Court, and then only upon writ out of *Chancery;* and "if goods had been distrained within a liberty that had return of writs, he could not enter into the liberty, but was driven to make a warrant to the baylie of the liberty to make deliverance (*b*)." The statute of *Marlbridge*, 52 *Hen. 3*, c. 21, enlarges his power, by allowing him to grant replevin upon plaint, and that even out of Court, when goods have not been taken in any liberty; but the statute adds, that where they have been taken in any liberty, "et balivi libertatis ea deliberare noluerint, tunc vicecomes *pro defectu ipsorum balivorum* ea faciat deliberari," making the default of the bailiff a condition precedent. Now here the bailiff of the liberty has not made default, and the sheriff therefore had no right to replevy. It was contended, on moving for this rule, that the replevin by the sheriff was valid, although he might be liable at the suit of the lord for replevying without a *non omittas;* and *Darby* v. *Foxley* (*c*), *Com. Dig.* Retorn (A), and *Newland* v. *Cliffe* (*d*), were referred to. The answer is, that it is only by the Statute of *Marlbridge* he has any right to enter a liberty (*e*), and that this statute does not confer such right on him until after default made by the bailiff of the liberty. It was also contended, that the lord cannot grant effectual relief in cases of wrongful distress, inasmuch as he is not empowered to grant replevins out of his court, which are only held at intervals of three weeks, or to issue a writ of second deliverance; so that the interposition of the sheriff is, it was said, requisite to prevent a failure of justice. It is true that in *Chapman* v. *Wish* (*f*) some objections of this sort were taken to the claim of cognisance made by the University of *Cambridge* in a case of replevin. But the judgment of the Court was pronounced against the claim solely on the ground of a variance, and supplies no confirmation therefore to these objections; nor does it seem to be settled that the lord has not jurisdiction to grant a writ of second deliverance (*g*). *Hallet* v. *Byrt* (*h*), deciding that the Hundred Court cannot grant replevin *out of Court*, does not impugn the franchise set up here, which assumes no such privilege; and in *Wilson* v. *Hobday* (*i*), the Court were of opinion that a special custom authorising the Mayor of *Canterbury* to grant replevins might well be supported, although there was a sheriff of the same city and county. The Statute of *Marlbridge* gives addi-

(*a*) Before Lord *Denman*, C. J., *Williams*, J., and *Coleridge*, J.; *Littledale*, J. was absent from illness.
(*b*) 2 Inst. 139.
(*c*) 1 Rolle Rep. 118.
(*d*) 3 B. & Ad. 630.
(*e*) Fitz. Nat. Brev. 158.
(*f*) Fitzgibbon, 153.
(*g*) Bro. Abr. *Cognisance*, pl. 23.
(*h*) 1 Lord Raym. 218; *S. C.* differently reported in 5 Mod. 252; Skin. 674; 2 Salk. 580; and see Bac. Abr. *Replevin* (E).
(*i*) 4 Maule & Selw. 120.

tional powers to the sheriff of the county, but leaves the powers of the lord of the franchise just as they were.

There is, at all events, no ground for this action. When goods are distrained after replevin by the sheriff, a writ of second deliverance should be sued out by the plaintiff; and if the goods be eloigned, a writ of *capias in withernam* is the proper remedy.

R. Alexander and *Wightman, contrà.*—A prescriptive right must always be strictly pleaded and strictly proved. The Statute of *Marlbridge* was a great boon to the community, by giving them a right to replevy before the sheriff upon plaint without writ, and at all times, whether in or out of Court. One of the great grievances which the legislature meant to redress, was the dilatoriness and inefficiency of the prescriptive franchises (*a*). If it be necessary that some default be made by the bailiff of the liberty, before the replevin by the sheriff of the county can be justified, the total incapacity of the lord to act elsewhere, or at any other time than at his three weeks' court, might itself be treated as a default. His inability too to appoint deputies, as the sheriff may under 1 & 2 *Phillip & Mary*, s. 3, to break into buildings, as the sheriff may under the Stat. of *Westminster* 1, in order to deliver cattle detained under distress, or to grant a writ of second deliverance, are defaults inherent in the constitution of his court. This inability to direct a writ of second deliverance to the sheriff, though it is not the ground upon which the claim of cognisance was disallowed in *Chapman* v. *Wish* (*b*), yet is much dwelt upon by the Court as well as the counsel; and it is laid down in *Draper* v. *Crowther* (*c*), that claim of cognisance should not be allowed, where the consequence would be a failure of justice. *Wilson* v. *Hobday* (*d*) does not decide that the lord was possessed of the franchise claimed by him to grant replevins, but simply that the question whether he has such franchise or not must be raised on the pleadings.

But it is not necessary to contend that the Statute of *Marlbridge* has taken away the jurisdiction of Lord *Egremont;* it is enough to shew that the sheriff has at least concurrent jurisdiction with him to grant *replevins* in all cases, although he may not make *deliverance* in some cases until after default made by the bailiff of the liberty. The distinction is between taking replevin of the goods and making deliverance of them. The sheriff may always take replevin, although he may not at once deliver the goods, where they are both taken *and* impounded within the liberty. *Gilbert on Replevin*, p. 77, observes, "The sheriff having thus taken pledges, &c., ought forthwith to make deliverance of the goods and cattle distrained; but if the distress was *taken within the liberty and impounded there*, the sheriff ought first to issue his warrant to the bailiff of the liberty, having return of writs, to make deliverance." This passage confirms the distinction taken; the author says generally, that the sheriff may "take pledges," that is, make replevin, although in one case only he cannot deliver in the first instance. But, for any thing disclosed in this plea, the sheriff might in this case not only replevy, but deliver the distress, without any previous default by the bailiff; for the author adds, "And by this act, if a distress was taken *out* of a liberty, and impounded within it, the sheriff might enter

(*a*) 2 Inst. 139, and Gilb. on Replevin, 68.
(*b*) Fitzgibbon, 153.
(*c*) 2 Ventr. 363.
(*d*) 4 Maule & Sel. 120.

the liberty without any previous warrant to the bailiff, because the caption, which is one of the points complained of in the replevin, was in the county and out of the liberty." It may be inferred from these and other passages, and also from 2 *Inst.* 139, that the sheriff may always take the replevin, and may also enter the liberty without a *non omittas* clause, and, without previous warrant to the bailiff, make deliverance of goods, unless both the points complained of, that is, both the taking and the impounding, have occurred within the liberty. This plea certainly states that the goods were taken within the liberty, but not that they were there impounded also; and therefore no warrant to the bailiff, even to deliver the goods, was necessary, nor need any default on his part be shewn; and even if the goods had both been taken and impounded within the liberty, the replevin of them by the sheriff, stopping short of their actual deliverance, was perfectly legal. It may be observed further, that it is quite consistent with this plea that the sheriff did, before replevin, send his warrant to the bailiff of the liberty.

Lastly, even if the lord were the proper person to take the replevin in this case, the replevin by the sheriff is not void, but voidable only. This question does not arise between the lord and the sheriff, and the plea does not aver that any notice of the lord's franchise was given to the sheriff. In *Fitzpatrick* v. *Kelly*, which was cited in argument in *Rex* v. *Stobbs* (*a*), it was held, that although an arrest by the sheriff within the verge of the palace was a contempt, unless he acted with leave of the Board of Green Cloth, yet that the arrest was not void. So, as to an arrest by the sheriff without a *non omittas* in the liberty of *Malden*, that the sheriff might be liable at the suit of the bailiff of the liberty, yet that, as against the defendant, the arrest was not wrongful, *Piggott* v. *Wilkes* (*b*); and in *Jackson* v. *Hunter* (*c*), a bail-bond given to the sheriff of *Durham*, under a writ issued immediately from this Court to him, was held not to be void.

Cur. adv. vult.

Lord DENMAN, C. J. on this day delivered the judgment of the Court:—This was an action on the case for various oppressive and irregular proceedings in taking a distress. There were various pleas. The jury found for the defendants on all the issues; but as to the plea pleaded to the fourth count, a rule was obtained and argued for entering judgment for the plaintiff, notwithstanding the verdict, on the ground that the plea is bad in law. The grievance set forth in this count is, that the defendants sold the goods distrained for rent due in respect of a farm, land, and premises, after the sheriff had granted a replevin of them to the plaintiff. The plea states that the farm, land, and premises, in which they were taken, are within the honor or lordship of *Cockermouth*, and that Lord *Egremont*, as lord of the honor, had cognizance of pleas and plaints in replevin in courts baron of the said honor, holden from time beyond legal memory, from three weeks to three weeks, where plaints in replevin may be instituted, with a power to replevy and grant deliverance of goods wrongfully distrained within the honor, such as the sheriff had before the Statute of *Marlbridge*, and that no sheriff might enter the said honor except on default of the bailiff, by means whereof the right to grant replevins belonged to the lord, and that he had made no default in replevying or granting deliverance in this case; with an averment that the sheriff, before replevying, did not request the lord to replevy or grant de-

(*a*) 3 T. R. 740 (*b*) 3 B. & Ald. 502. (6) T. R. 71.

liverance; and that the sheriff granted the replevin out of his County Court. The validity of this plea was argued in the most learned and elaborate manner, but rather perhaps as between the sheriff of the county and lord of the honor, than with reference to the litigating parties. The plaintiff contended that the whole record shewed him to have been aggrieved within either the first or the second clause of the twenty-first chapter of the Statute of *Marlbridge*; the former providing that the sheriff may deliver goods taken and detained after plaint levied, if they are taken out of liberties; the second, that "if the beasts were taken within any liberties, and the bailiffs of the liberty will not deliver them (*noluerint ea deliberare*), then the sheriff, for default of those bailiffs, shall cause them to be delivered." It was said that the plea did not shew the goods to have been impounded within the honor of *Cockermouth;* and certainly it makes no direct allegation of that fact; but the cause of complaint being the sale after a replevin by the sheriff, it is sufficient if it shews facts by which the jurisdiction of the sheriff to grant such replevin is taken away, and that objection to the sale therefore removed. The plea alleges, in the words of the statute, a taking, *i. e.* a distraining within liberties. The declaration has charged no wrongful removal, and we think therefore that the place of impounding has not been made material by either party. The taking then having been within a liberty, the sheriff acquired from the statute jurisdiction to replevy in the event there described, *i. e.* if the bailiff of the honor would not deliver them; then by that defect of that bailiff the sheriff is empowered to act. But can we say that the bailiff in this case *would not* deliver the cattle, when the plea states that the sheriff had not required him so to do? *Coke*, in his commentary on this chapter, founding himself on *Fleta's* authority, expressly says, "that in such case the sheriff ought to make a warrant to the bailiff of the liberty to make deliverance, whereunto if he make no answer, or returns that he will make no deliverance, or the like, the sheriff may, by force of this statute and *Westminster* 1st, enter into the liberty and make deliverance." This refers to the 17th chapter of *Westminster* the first, which enjoins the sheriff to employ force, if necessary, for rescuing distresses improperly detained, and enacts a severe punishment against the takers; but this provision is also made to take effect after the lord or taker shall be admonished to make deliverance to the sheriff. It seems impossible then to construe the word *noluerint* in the ordinary sense of a mere neglect or *nonfeazance*, when it evidently imports refusal to comply with a demand. Now in this case no demand was made, and we might propose a second question, of what default, under these circumstances, the lord of the liberty can be deemed guilty. The statute, while it represses illegal proceedings in the owners of franchises, recognises and preserves their legitimate rights; and it would seem hard to charge them with default where they proceed with all due diligence, according to the course and practice of their courts. If, however, the incapacity to administer a remedy as speedily as the common law would, by the hands of a sheriff, can be called a default, there can be no grievance in any particular instance, without its being made to appear that such delay has, in fact, taken place. By possibility the three weeks' court might have been held immediately, and so have enabled the lord to replevy as early as the sheriff could. But these inquiries are really out of the present case, which charges the landlord with oppressive conduct in selling after replevin granted, but does not shew that he ever had notice that it was granted. It was indeed argued that the sheriff

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may possibly have sent his warrant to the lord's bailiffs, (as *Coke* intimates he ought,) consistently with the plea. This is true; but that fact cannot be inferred when it is essential towards establishing the plaintiff's case of grievance; still less should we be justified in presuming that notice, without which the sale by the defendant is blameless. The grant of a replevin is a matter exclusively between the officer who grants it and the owner of the distrained goods; if the distrainer is to be affected by it, he must receive notice that it has been done. Here then is a short answer to the plaintiff's case on the count under consideration. Perhaps his declaration was demurrable for not averring notice; the want of it might have been pleaded, and would have been a good defence. At all events, when the record fails to show that the sheriff, who was not originally the proper officer to replevy, gave the defendant notice of his having acquired and exercised that power, the apparent right of action, whatever it may have been, vanishes from the record.

Rule discharged.

TYSON *v.* SMITH.

May 5th.

A custom is good for *all* victuallers, upon the waste of a manor selected by the lord for holding fairs yearly, to erect booths and place posts and tables there a reasonable time before the first, and to continue them, until a reasonable time after the last of such fairs, they paying him therefore 2*d.* each.

TRESPASS for breaking and entering the close of the plaintiff, called *Rousley Fair Ground*, in the parish of *Westward*, in *Cumberland*. Second plea, that from time whereof &c., on certain days in each and every year, to wit, on *Monday* next after the feast day of *Pentecost*, in each and every year, and afterwards on each alternate *Monday* in each and every year, until the feast of *All Souls*, fairs for buying and selling of all kinds of goods, wares, and merchandizes, have been, and of right ought to have been, and still of right ought to be holden, on the commons or waste grounds of the manor of *Westward*, in the county of *Cumberland;* that is to say, on some part thereof appointed for that purpose, from time to time, by the lord of the said manor for the time being. And that from time whereof &c. there hath been, and of right ought to have been, and still of right ought to be, an ancient and laudable custom, *that every liege subject of this realm, exercising the trade of a victualler*, at a reasonable time before the *Monday* next after the feast day of *Pentecost*, in each and every year, hath, during all the time aforesaid, been used and accustomed to enter, and of right ought to have entered, and still of right ought to enter, into and upon the part of the said commons or waste grounds of the said manor, lordship, or forest, from time to time appointed for holding the said fairs, by the lord of the said manor, lordship, or forest, for the time being, and for the more conveniently carrying on his said trade or calling, *to erect a booth and stall, and to put and place posts and tables there*, and to keep and continue the said booth, stall, posts and tables, so erected, put, and placed, from thenceforth until a reasonable time after the last of the said fairs so as aforesaid holden in each and every year before the *Monday*, &c. The plea then proceeded to justify under this custom. The third plea varied the custom, by stating the lord's right to a compensation of 2*d.* from every victualler availing himself of the custom.

Replication, traversing the custom.

At the trial before Lord *Abinger*, C.B. at the *Cumberland* Summer Assizes, 1835, a verdict was ound for the defendant. In the following *Michaelmas*

term, *Blackburne* obtained a rule nisi for entering up judgment for the plaintiff, notwithstanding the verdict, on the ground that the custom set up by the defendant was invalid.

Cresswell and *Wightman*, in *Hilary* term last, (*January* 26th,) shewed cause (*a*).—The custom, on which the defendant relies, is valid and reasonable; but a custom is not to be disallowed as a matter of course, even where no sufficient reason for it may appear at the present day; per *Coke*, J. in *Hix* v. *Gardner* (*b*). In that case a custom binding the resiants within the manor to grind their corn at the lord's mill; and in *Drake* v. *Wiglesworth* (*c*), a similar custom, with a payment of toll also for grinding, was held good. In *Cocksedge* v. *Fanshaw* (*d*) it appeared that the corporation of *London* had a customary duty on corn imported, from which freemen were exempt; and it was held a good custom that factors, being freemen, should receive to their own use the duty arising from corn consigned to them merely as factors. *The Mayor of Northampton* v. *Ward* (*e*), *Rex* v. *Burdett* (*f*), and *The Mayor of Norwich* v. *Swann* (*g*), were cited when the present rule was moved. The doctrine laid down in the first of those cases, that the right to attend a market does not involve the right of placing a stall there, cannot be disputed. But *Lee*, C. J. states, that this latter right may be acquired on payment of a compensation. Now the defendant's third plea does not claim this right, except on the customary payment of *2d.*, and is therefore supported by the above authority. *Rex* v. *Burdett* (*f*), which decides only, that if the owner of the soil of a market-place covers the market-place so completely with stalls, that the market people are obliged to use them, then the taking stallage by the lord for the use of them is extortion, does not apply. In *The Mayor of Norwich* v. *Swann* (*g*), which was trespass for setting tables in a market-place, there was no customary compensation upon which the defendant's claim could rest. The principle of all the cases on this part of the subject is merely that there can be no valid custom to break the soil, without compensation to the owner of the soil. In this case he is owner of the fair also, so that no objection can be taken, that by the custom of Borough-English the owners may be two distinct persons. One objection to this custom is, that so many victuallers might crowd into the market as to exclude from it the owner of the soil and every other person. Many customs, however, have been allowed which were equally unrestricted. A custom for all the inhabitants of a town to dance in a particular field, is good; so for all persons to go on the sea shore and fish, or to dry their nets on land adjoining it (*h*); or to enter a port and to load and unload their cargoes. Yet if all the persons respectively intitled chose to avail themselves of these several customs at the same time, just as great inconvenience would follow as can be imagined in this instance. The claim here is not of *profits à prendre*, but simply of an easement.

Blackburne, *Armstrong*, and *W. H. Watson*, *contrà*.—There are three objections to the custom set up. First, It is too large with reference to the

(*a*) Before Lord *Denman*, C. J., *Williams* and *Coleridge*, Js.; *Littledale*, J., was absent from illness.
(*b*) 2 Bulst. 196.
(*c*) Willes, 654.
(*d*) 1 Doug. 119.
(*e*) 2 Str. 1238.
(*f*) 1 Ld. Raym. 148.
(*g*) W. Bl. 1116.
(*h*) Bro. Abr. Custom, pl. 46.

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number of persons for whom it is claimed. It is claimed for all victuallers in the kingdom. Now, at common law, the trade of victuallers was open to any person; who therefore might have exercised it for a single day, and for the first time at this fair, so that the public might have been excluded altogether. *Rex* v. *Burdett* (*a*) shews that the lord may be indicted for extortion, where he allows too many stalls at a fair. Yet, if this custom be good, too many stalls may be erected against the will of the lord, and a responsibility be thrown upon him, from which he cannot screen himself. A custom cannot extend to all persons indiscriminately. A custom for all the inhabitants of a parish to play at lawful games in the close of *A.* is good; but a similar custom for all persons "for the time being in the said parish," is bad: *Fitch* v. *Rawling* (*b*). Some of the cases put on the other side, as for all persons to load and unload in a port, are instances of rights enjoyed, not by custom, but by common law. To an information for lading wine in a foreign ship, the defendant pleaded a licence of the King to *J. S.* to do so, that such a licence, by custom of merchants throughout *England*, was assignable, and had been assigned to him; and "it was argued for law that a man cannot prescribe custom throughout *England*, for if it be throughout *England*, it is a common law and not a custom" (*c*).

2d. This custom of pickage and stallage, involving the necessity of breaking the soil, is not an easement, but a claim of *profits à prendre in alieno solo*, which are not the subject of custom. In the passage already cited from *Broke's Abr. Custom, pl.* 46, as to the custom of drying nets, it is added, that a custom to drive stakes in the land for that purpose, is bad. One great objection to such a right as the subject of custom is, that it cannot be released; *Gateward's* case (*d*).

3d. The mode claimed for its enjoyment invalidates this custom. One victualler might set up a stall large enough to cover the whole fair. Every claim of *profits à prendre* must be restrained. A plea of right of common, without averring that the cattle were levant and couchant, is bad upon general demurrer (*e*); and if the lord approve under the Statute of *Merton*, he must leave sufficient for the commoners. There cannot be a good custom for him to grant leases of the waste of his manor without restriction, *Badger* v. *Ford* (*f*).

Lord DENMAN, C. J. in this term (*May* 5th) delivered the judgment of the Court.

This was a motion for arresting the judgment, where a verdict had been found for the defendant, on a plea which set up a custom for all victuallers to erect booths on the *locus in quo*, being parcel of the waste of a manor, selected by the lord for holding fairs yearly, every fortnight, a reasonable time before *Monday* next after the feast-day of *Pentecost*, and continue them so erected until the feast of *All Souls*. The defendant claimed as a victualler a right to erect such booth, and keep it there during the whole period, paying 2*d.* to the lord.

The plaintiff's arguments to shew this custom was bad in law, resolved themselves into the objection that it was too large and indefinite, as admitting

(*a*) 1 Ld. Raym. 148.
(*b*) 2 H. Black. 393.
(*c*) Viner's Abr. Custom, 5, p. 175.
(*d*) 6 Rep. 59 b.
(*e*) 1 Wms. Saund. 28 a, n. 4.
(*f*) 3 B. & Ald. 153.

all victuallers,—an undefined body, who might cover the whole land in question, to the exclusion of the plaintiff himself, and all others wishing to attend the fair, during a considerable time of the year. But in the absence of all authority we are of opinion that the custom is good. The description of a victualler is sufficiently definite, and the attendance of that class of persons at a fair is convenient, or rather necessary, for the refreshment of those resorting to it. The exclusion of the owner from his own soil may certainly be lawful by virtue of a reasonable custom, and the exclusion for the whole period may be necessary to induce the victualler to bring his booth to a spot possibly so distant, that frequent removals and re-erections might reduce his profits to nothing. And the apprehension that the resort of victuallers may be so numerous as to interfere with all others who may have business to transact at the fair, appears to us altogether unreasonable and extravagant. If it could prevail, it must indeed extinguish the fair itself, to which all traders of every class may resort for the purpose of vending their wares, while due regard to their own interest must limit their actual attendance to such a number as appears likely to have a fair chance of trading successfully.

Rule discharged.

The KING *v.* GREENE and others.

April 22*nd.*

The insertion of the name of a town in Schedule A of the Municipal Corporation Act, raises a presumption that such town possesses a municipal corporation.

But the Court will not act upon the presumption if it be negatived by facts on affidavit.

BLACKBURN had obtained a rule nisi for a *mandamus*, commanding the defendants, who in the rule were styled late stewards and late town-clerk of the borough of *Gateshead*, in the county of *Durham*, to deliver up to the council, the mayor and aldermen, all the monies, goods, &c. &c. belonging to or concerning the borough-holders and freemen of the said borough, which were in their possession &c. on or after the 5th of *June*, 1835, or at the time of granting the rule.

Gateshead is one of the places named in Schedule A of the Municipal Corporation Act. But it was stated by the affidavits on behalf of the defendants, that the town had never received a charter of incorporation, and that the only corporations which had ever existed therein, were granted by the Bishop of *Durham* for the time being, who is the lord paramount. These corporations were for trading purposes only, and never exercised any municipal powers. The borough-holders and freemen were the owners in fee of certain tenements, to which they were admitted at the court of the lord of the manor of *Gateshead*. There was no election of freemen, and these tenements were descendible or alienable, at the pleasure of the tenant. The returning officer for *Gateshead* was appointed by the sheriff. It appeared from the affidavits on the other side, that the steward received a copy of the Municipal Reform Act from the post-office; that the councillors were elected under it, *January* 1836, and that no proceedings have been commenced against the parties elected. The present application was on behalf of the officers elected under the act.

Sir *J. Campbell*, A.G. (with whom were *R. Ingham* and *A. J. Stephens*,) was stopped by the Court.

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Talfourd, Serjt. and *Wightman*, in support of the rule, contended, that as there appeared to have existed from ancient times corporations possessing many of the attributes and characters of a municipal corporation, the Court would not decide on affidavits merely that *Gateshead* was no corporation, more especially since it had been acknowledged as such in schedule A of the Municipal Reform Act.

Lord DENMAN, C. J.—The insertion of *Gateshead* in the schedule to the Municipal Corporation Act, raises a presumption that it possessed a municipal corporation. But that presumption is rebutted by the facts stated in the affidavits. And since no answer has been suggested to those facts, we should not be justified in treating *Gateshead* as a borough, by granting this *mandamus*.

Rule discharged (*a*).

(*a*) See *Rex* v. *White*, 2 Har. & Wol. 403.

IBBOTSON, Bart. and POLLARD, *v.* FENTON.
The Same and BACON *v.* The Same.

May 6th.

The Court will on motion grant the reversal of an outlawry after final judgment, for presumed irregularity, without requiring, as a condition of the reversal, that the defendant should pay interest from the time of the judgment.

THESE were two actions, one on a bond, the other in covenant, wherein the plaintiffs having obtained verdicts at the *York* Summer Assizes, 1835, signed final judgment 26th *November* of the same year. No execution issued against the defendant, but the plaintiffs proceeded to outlawry, which was completed 26th *November*, 1836, and a special writ of *capias utlagatum* was duly issued and returned in each case. The same year the defendant came in to reverse the outlawry, but it did not appear upon what grounds. In *March* last both parties attended before Lord *Denman*, C. J. at chambers, on a summons taken out by the defendant. The plaintiffs were willing that the outlawry should be reversed, provided they were paid the principal and interest, to which they were entitled by the verdict, the costs in the actions, and in the proceedings to outlawry, together with interest upon the judgments up to the time of payment. The defendant objected to the payment of this interest. Eventually it was arranged that the interest should be paid into Court, subject to the event of an application to the Court; and thereupon his Lordship made an order for the reversal of the outlawry upon the payment of the amount recovered, damages and costs in the actions, as tried on the final judgments, the costs of the proceedings in outlawry, (without prejudice to their continuance,) and the payment of the interest into Court, subject to the application.

The master ascertained the amount of interest, which was paid into Court, and the defendant paid to the plaintiffs the other sums, pursuant to the master's taxation. A rule nisi having been obtained by the plaintiffs for the payment of this amount of interest to them,

Cresswell now shewed cause.—Process of outlawry is in truth nothing more than a proceeding to bring a party into Court, and make him do the act which he has before neglected to do. Thus, in the case of outlawry on mesne

process, the outlawry is reversed upon putting in bail. If the exigent proceed after final judgment, the debt and costs only must be paid (*a*). It is true, that if on a writ of error the judgment be affirmed, interest is allowed; but that is on the ground that there is a new judgment.—[*Littledale*, J.—And that is done by virtue of the statute 3 *Hen.* 7, c. 10.] There exists no authority in the Court to prescribe terms upon which the outlawry shall be reversed; the statute 4 & 5 *W. & M.* c. 18, ss. 3 and 4, enables a party to appear by attorney, in cases of outlawry, for the purposes of its reversal, and directs the sheriff to discharge the party arrested, upon an engagement by an attorney to appear and reverse the outlawry.—[*Patteson*, J.—I know of no act of parliament that gives a right to reverse an outlawry, except for irregularity. The proceedings in outlawry generally are irregular, because they are not had recourse to till after the party has left the kingdom, and that constitutes an error in fact. The statute referred to allows a party to appear by attorney, which he could not do before, but it gives him no more power to reverse the outlawry than he had previously.] If the Court has no power inherent in itself to reverse the outlawry, it is difficult to understand how it can do so by consent, but if they have such power, then by analogy to the practice in mesne process, this outlawry should now be reversed without any further payment.—[*Coleridge*, J.—The cases are not analogous; in mesne process, after reversal, the action goes on; but here, if the outlawry be reversed, the plaintiff can never recover his money.] There is no reason why a party should be in a better condition by issuing process of outlawry, than he otherwise could have been. He could not have recovered this interest under any other form of proceeding; if the Court can prescribe such terms, they must have authority to prescribe any terms whatever.—[*Coleridge*, J.—On what do you found the power of the Court to reverse the outlawry?] On the ground that the outlawry has discharged the duty for which it issued. The debt and costs have been paid.

J. Bayley, contrà.—The parties have agreed to refer this question to the equity of the Court. It is only by indulgence that an outlawry can be reversed on motion; and there are many cases where the Court has refused such indulgence, and driven the party to his writ of error. The defendant ought not to be in a better condition by reason of his own delay; *Campbell* v. *Dalby* (*b*). In *Vin. Abr.* tit. Interest, there are several cases collected, in which the Courts have allowed interest. It may be recovered on a judgment of a Court of Equity, *Brown* v. *Barkham* (*c*), *Godfrey* v. *Watson* (*d*). In *Bann* v. *Dalzell* (*e*), Lord *Tenterden* held that interest might be recovered on an Irish judgment. There is nothing in this case from which the Court will pronounce that the proceedings have been irregular.

Lord DENMAN, C. J.—If the practice of the Court had ever been to allow interest upon the reversal of an outlawry, no doubt the plaintiffs would be entitled to it; but the practice has always been otherwise, and has now become so inveterate that we cannot interfere with it. Upon this motion we must presume irregularity in the outlawry; the same rule must therefore

(*a*) Tidd's Prac. tit. Outlawry.
(*b*) 3 Bur. 1420.
(*c*) 1 P. Wms. 65?.
(*d*) 3 Atk. 517.
(*e*) M. & M. 228.

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govern us in reversing it as if there had been proceedings in error; and we cannot attach any conditions to the reversal.

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LITTLEDALE, J.—These parties have not been precluded from recovering this interest; they might have done so had they chosen to bring an action on the judgment, *M'Clure* v. *Dunkin* (*a*). The recovery of it, therefore, depends upon the nature of the proceedings taken, and I am of opinion that we should act in direct contravention of the established practice of the Court, if we allowed interest on the present occasion. The stat. 3 *Hen.* 7, c. 10, confirmed by 19 *Hen.* 7, c. 20, provides, that where, after error brought, the judgment is affirmed, the plaintiff shall recover his costs and damages for the delay, and under that act the interest has been held to be recoverable. Here the exigent must have been on a *ca. sa.* on the judgment, and had the defendant appeared before the return of the exigent, he could only have been compelled to pay the debt and costs. I can have no doubt that if error had been brought, these proceedings would have been found to be erroneous, and then they would have been reversed upon the same terms. Such has always been the practice, and we cannot now alter it by adding other terms.

PATTESON, J.—We cannot introduce a new practice. The Court never makes a party pay interest on the reversal of outlawry after final judgment. Of course, in case of mesne process, that could not be done, because it would be prejudging the question in the cause.

COLERIDGE, J. concurred.

Rule discharged.

(*a*) 1 East, 436.

The KING *v.* RICKETTS.

April 21*st*.

A writ *de contumace capiendo* must be addressed to the sheriff of the county of which the party contumacious is described in the significavit, and if addressed to the sheriff of another county is irregular, and the Court will quash it on motion.

SIR *F. Pollock*, in *Michaelmas* term, had obtained a rule to quash a writ *de contumace capiendo*, issuing upon a significavit from the *Arches Court of Canterbury*, for irregularity, with costs. The rule was obtained before the return-day, and the defendant was not in custody. The writ was as follows:—

"Of *Easter* Term, in the sixth year of the reign of King *William* the Fourth.

"*Herefordshire.* Our lord the king hath sent to the sheriff of *Herefordshire* his writ, closed in these words; that is to say, *William* the Fourth, by the grace of God, &c. To the sheriff of *Herefordshire*, greeting. Sir *John Nicholl*, Knight, doctor of laws, official principal of the *Arches Court of Canterbury* lawfully constituted, hath signified to us that one *Thomas Bourke Ricketts*, Esq. of the parish of *Presteign*, in the county of *Radnor*, is manifestly contumacious, and contemns the jurisdiction and authority of the law and jurisdiction ecclesiastical, in not obeying the lawful commands of the said Sir *John Nicholl*, Knight, the judge of the said Court lawfully authorized, contained in a certain monition duly issued under the seal of the said *Arches Court of Canterbury*, bearing date &c., and which was personally served upon the said *Thomas Bourke Ricketts* the 15th day of *July* following, and returned to the said Court with a certificate of the due execution thereof, and an affidavit as to the truth of such certificate; whereby the said *Thomas Bourke Ricketts* was monished peremp-

torily and personally to pay, or cause to paid to *John Bodenham, R. L., J. A. P.*, and *W. H.*, or to their proctor, the sum of 55*l.* 15*s.* 4*d.*, at which sum the costs incurred in the said *Arches Court*, on the part and behalf of the said *John Bodenham*, &c. were taxed and moderated, together with the expense of the said monition, on a day and hour long passed, under pain of the law and constraint thereof; and which monition issued in a certain cause or business of appeal and complaint of nullity lately depending before the said Sir *John Nicholl*, Knight, the judge aforesaid, between the said *Thomas Bourke Ricketts*, the party appellant and complainant in the said cause, on the one part, and the said *John Bodenham*, &c. on the other part; and which in the first instance thereof was a cause of subtraction of church-rate or church-rates, promoted and brought by the said *John Bodenham*, &c. against the said *Thomas Bourke Ricketts* in the *Episcopal and Consistory Court of Hereford*; nor will he submit to the ecclesiastical jurisdiction. But forasmuch as the royal power ought not to be wanting to enforce such jurisdiction, we command you that you attach the said *Thomas Bourke Ricketts* by his body, until he shall have made satisfaction for the contempt. And how you shall execute this our precept notify to us on &c., wheresoever we shall then be in *England*, and in nowise omit this; and have you there this writ. Witness ourselves at *Westminster* &c. And be it known, that the said writ, on *Monday* the 9th day of *May*, in the same term, before our said lord the King at *Westminster*, was delivered of record to the sheriff of *Herefordshire*, to be executed in due form of law."

The objections to the writ were, that it was not in the form prescribed by the statute (*a*), being directed to the sheriff of *Herefordshire* instead of the sheriff of *Radnorshire*, of which county the defendant was described to be; second, that it did not appear on the face of the writ that the *Ecclesiastical Court* had any jurisdiction, as the writ did not state that the church-rate in dispute was above 10*l.*; that the writ proceeded on the commands of the official principal of the *Court of Arches* having being disobeyed, whereas the defendant, under the act giving an appeal from the sentence of a bishop to the archbishop, was only bound to obey the commands of the official principal of the Archbishop of *Canterbury* (*b*), and although these two offices happen to be united in the same person, that circumstance is accidental, and cannot supply the patent want of jurisdiction.

Sir *J. Campbell*, A. G. (*c*) now shewed cause. The previous proceedings relative to this case are reported in 1 *Har. & Wol.* 64. Since then it has been necessary from lapse of time to sue out fresh writs. The Court of *Chancery* decided that the previous writ, which is the same with the present, was regular. The party can now avail himself of nothing which is not on the face of the writ. No facts are here brought forward upon affidavit, as in *Rex* v. *Blake* (*d*). Forms given in the schedule of an act are directory only, not

(*a*) 53 *Geo.* 3, c. 127, in the schedule, of which the following form is given:—"*George* &c. To the sheriff of ——, greeting. The —— hath signified to us that ——, of ——, in your county of ——, is manifestly contumacious, and contemns the jurisdiction and authority [*here fully state the non-appearance, disobedience, together with the commands disobeyed, or the contempt in the face of the Court, as the case may be,*] nor will he submit to the ecclesiastical jurisdiction. We command you that you attach the said —— by his body, until he shall have made satisfaction for the said contempt; and how you shall execute this our precept, notify unto ——, and in nowise omit this, and have you there this writ. Witness ourself at *Westminster*, the —— day of ——, in the —— year of our reign."

(*b*) 24 *Hen.* 8, c. 12.

(*c*) Before Lord *Denman*, C. J. *Patteson* and *Coleridge*, Js.

(*d*) 2 B. & Ad. 139.

obligatory. In filling up the blank left for the residence of the party in the form of a *capias*, given in the Uniformity of Process Act, it is not necessary that such residence should be in the county of the sheriff to whom the writ is directed; *Rolfe* v. *Swann* (*a*). The writ can only authorise the sheriff to take a party within his bailiwick; if the party be not within it, therefore, he cannot be arrested, but if he came within it, the sheriff would no doubt have authority to take him wherever his residence might be.

Sir *F. Pollock* and *J. W. Smith, contrà*. This writ is not the same as that with respect to which there has been a decision. It differs from it both in form and substance. But even if it had been the same, still in favour of liberty it is open to the defendant to take these objections to it when afterwards discovered. The statute requires that the writ should be "in the form to this act annexed;" that amounts to a peremptory enactment, and is the same as if it had said "shall be in these words." And even if this be a variance in form only, still it is fatal. In *Hannah* v. *Wyman* (*b*), *Parke*, B. says, where there is an express enactment that a particular form shall be adopted, a deviation from that form has been held to be fatal. There are many cases which establish the same principle with equal strictness; *Rex* v. *Jeffries* (*c*), *Davison* v. *Gill* (*d*), *Goss* v. *Jackson* (*e*), *Rex* v. *Milverton* (*f*), *Rex* v. *Middlesex* (*g*). By the form in the schedule the party to be taken is spoken of in the writ to the sheriff as "——, of ——, *in your county*;" and the importance of that restriction is obvious, because the writ contains no further restrictions as to the bailiwick of the sheriff. Therefore if the form used were good, the sheriff would by it be authorised to take a party out of his county. "Of such a place," must necessarily be construed to mean who resides at; *Yardley* v. *Jones* (*h*).

Cur. adv. vult.

Lord DENMAN, C. J. this term delivered the judgment of the Court.—This was a writ *de contumace capiendo* on the significavit of Sir *John Nicholl*. Several objections were taken to the writ, on which a rule nisi was obtained to quash it. As we are of opinion that one of these objections is fatal, it is not necessary to notice the others. The writ was directed to the sheriff of *Herefordshire*, and it recites a significavit that *Thomas Bourke Ricketts*, of *Presteign*, in the county of *Radnor*, is contumacious, and commands the sheriff to attach him by his body. The form of the writ is given in the schedule to the statute 53 *Geo.* 3, c. 127, and which writ is directed by the statute to be in that form, is "To the sheriff of ——, greeting. The —— hath signified to us that —— of ——, in the county of ——, is manifestly contumacious," &c. The form of the significavit is given in the same schedule, and notifies, "That one ——, of ——, in the county of ——, hath been pronounced contumacious, &c." It is plain, therefore, that the statute intends that the writ should be directed to the sheriff of that county of which the party is described to be in the significavit; that, in the present case, would be the sheriff of *Radnorshire*, and it is the more necessary that the form should in

(*a*) 1 M. & W. 305, per *Parke*, B.
(*b*) 3 Dowl. P. C. 673; *S. C.* 1 Gale, 105; 2 C. M. & R. 239.
(*c*) 4 T. R. 767.
(*d*) 1 East, 64.
(*e*) 3 Esp. 198.
(*f*) 2 Har. & Wol. 434; *S. C.* 1 Nev. & Per. 179.
(*g*) 2 Har. & Wol. 407; *S. C.* 1 Nev. & Per. 92.
(*h*) 1 Har. & Wol. 332.

this respect be adhered to, because neither in the form given by the schedule nor in the actual writ in this case, are the words " if he shall be found in your bailiwick," or any equivalent words, to be found, except the words " in your county," which are in the form given by the schedule, but which are different in this writ. On this ground we think that the writ must be quashed.

Rule absolute (*a*).

(*a*) See the two following cases.

The KING *v.* RICKETTS.

April 27th.

A writ *de contumace capiendo*, reciting a significavit by *two* delegates notifying a disobedience to the order of *three*, is bad, and the Court will quash it on motion.

Quære, whether the significavit must not expressly state that a commission had issued in the cause, and that the judges signifying were delegates under that commission.

A RULE had also been obtained to quash the following writ *de contumace capiendo*, upon a significavit from the *High Court of Delegates*, against the same defendant, who was not in custody.

" Of *Easter* Term, in the sixth year of King *William* the Fourth.

" *Herefordshire.* Our lord the king hath sent to the Sheriff of *Herefordshire* his writ, &c. *William* the Fourth, &c. To the Sheriff of *Herefordshire*, greeting. *John Daubeny* and *Thomas Blake* respectively, doctors of laws, judges amongst others delegate respectively appointed under a certain commission under the Great Seal of *Great Britain*, bearing date the 2d day of *June*, in the year of our Lord 1832, have signified to us, that one *Thomas Bourke Ricketts*, of the parish of *Presteign*, in your county of *Hereford*, Esq., is manifestly contumacious and contemns the jurisdiction and authority of the law and jurisdiction ecclesiastical, in not obeying the lawful commands (to pay or cause to be paid to *John Bodenham, R. L., J. A. P.*, and *W. H.*, or to their proctor, the sum of 213*l.* 16*s.*, being the amount of costs on their behalf, duly taxed, pursuant to a monition duly issued under seal of our *High Court of Delegates*, and duly and personally served on him the said *Thomas Bourke Ricketts*, Esq., and returned to our said *High Court of Delegates*, with certificate and affidavit of the execution thereof,) of the said *John Daubeny* and of *Joseph Phillimore*, and of the said *Thomas Blake*, doctors of laws, judges delegate (amongst others) respectively appointed under the said commission, and lawfully authorised, by not paying or causing to be paid to the said *John Bodenham*, &c. or to their proctor, the said sum of 213*l.* 16*s.*, according to the tenor of the said monition, on a day and hour now long past, in a certain cause or business of appeal and complaint of nullity from the *Arches Court of Canterbury*, promoted and brought by the said *Thomas Bourke Ricketts*, Esq., the party appellant and complainant, on the one part, and the said *John Bodenham*, &c., the parties appellate and complained of, on the other part, and which was originally and in the first instance a certain cause of subtraction of church-rates depending in the *Consistorial Court of Hereford*, promoted and brought by the said *John Bodenham*, &c., churchwardens of the parish of *Presteign*, in the counties of *Radnor* and *Hereford*, diocese of *Hereford* and province of *Canterbury*, against the said *Thomas Bourke Ricketts*, Esq. a parishioner and inhabitant of the said parish. Nor will he submit to the ecclesiastical jurisdiction. But forasmuch as &c., we command you, &c." |

The proceedings were originally in the *Diocesan Court*, for non-payment of costs in the *High Court of Delegates*. The objections made to this writ were, 1st, that it did not appear on the face of the writ that the church-rate in question was one over which the *Ecclesiastical Court* had jurisdiction; 2nd, that the significavit did not shew that the judges delegate, Dr. *Daubeny*, Dr. *Phillimore*, and Dr. *Blake*, were delegates in this cause at all; 3rd, that

admitting them to be so, it did not appear that they had authority to make the commands therein stated, without the concurrence of the other judges delegate; 4th, that the writ stated that the appeal to the delegates was from the *Arches Court of Canterbury*, whereas the 29 *Hen.* 8, c. 12, s. 7, gives no appeal from that court to the delegates, but to the archbishop only.

Sir J. Campbell, A. G. now shewed cause (*a*).—With respect to the second objection, it does not appear on the face of the writ that the doctors had no authority; on the contrary, it is alleged that they had. If the defendant wishes to contest this point, he should do so in the same manner as was done in the case of *Rex* v. *Blake* (*b*). There the affidavit shewed that there was a *quorum* clause in the commission, and that it was necessary all should join, and that only two had joined. This Court will, where it can, presume that all has been done rightly. These delegates were appointed under 25 *Hen.* 8, c. 19, s. 4, which act does not require any particular number to be appointed. There is nothing, therefore, to shew that they acted unlawfully. It is not necessary to set out the commission, and the significavit follows the form prescribed by 55 *Geo.* 3, from which it does not appear necessary to recite the circumstances giving the authority.

Sir F. Pollock and *J. W. Smith*, *contrà*.—Upon the face of the writ there is nothing to shew even that this commission issued in the suit in question, or to connect it with this cause. It is true, the writ says they inquired, but not that they were authorised to do so, nor to sit as a court of appeal in this case at all. Upon the face of the writ it is quite possible that these three learned doctors were not delegates in this cause. They may have meddled with what was not their business, as one doctor was held to have done in *Rex* v. *Blake* (*b*). These are not regular Courts, like those of common law, sitting continually, but are created for the occasion; and all the delegates must concur, unless it appear from their commission that a certain number only are authorised to act alone. The presumption is, that the concurrence of all is necessary. Lord *Coke*, Second Institute, p. 380(5); *Dyer*, 62. a. (*c*), are authorities on this point. The presumption is, not that all things are done rightly, but rather, in favour of liberty, that all things are done irregularly in proceedings of this nature. *Regina* v. *Hill* (*d*), *Com. Dig.* Excommengement (B 10), and the authorities there given, shew that the writ *de excommunicato capiendo*, which stands on the same footing as this, is never favourably regarded. *Rex* v. *Pyre* (*e*) and *Rex* v. *Dugger* (*f*) are to the same effect. But the present is not a case where even a favourable presumption could avail. The words of the statute are express, that the judge or judges whose commands have been disobeyed should signify. Here part of them only have signified the statute therefore not having been complied with, the objection must prevail.

Cur. adv. vult.

Lord DENMAN, C. J. in this term, delivered the judgment of the Court.—

(*a*) [illegible] Lord Denman, C. J. [illegible] edition various authorities are cited.
(*b*) 6 E. & A. 150. (*e*) 2 Str. 1067.
(*c*) In the marginal note to M. [illegible] (*f*) 5 B. & A. 791.

This writ against the same party as in the last case, is on a significavit by two (amongst others) under a commission of delegates. Several objections also were taken in this case. It may admit of much doubt whether the first blank in the form in the schedule is properly filled up, so as to shew that there was any commission of delegates at all: but the next objection, namely, that the significavit is by two, notifying a disobedience of the lawful order of three, is clearly fatal. The statute *53 Geo.* 3, c. 127, s. 1, enacts, "that it shall be lawful for the judges or judge whose lawful orders have not been obeyed, to pronounce the party contumacious, and to signify the same." It is clear under this enactment that all the judges, whose orders have not been obeyed, must certify; and even if the commission authorised two to certify that the orders of three had been disobeyed (which, however, does not appear in this case one way or the other), it would be difficult to say that such authority could prevail contrary to the words of this statute; for this reason we are of opinion that the writ must be quashed.

Rule absolute (*a*).

(*a*) See the preceding and the following case.

The KING *v.* HEWITT.(*b*)
Same *v.* Same.

J. W. SMITH, on the 28th of *May*, had obtained rules nisi to quash two writs *de contumace capiendo*, issued against the defendant on significavits from the Dean of the Arches, for disobedience of monitions directing payment of alimony.

1. A writ *de contumace capiendo*, directed to the sheriff of one county, and reciting a significavit, wherein the defendant is described as now or heretofore of the parish of *O*, in another county, is bad.

One of the writs was returnable the first day of *Trinity* term; the other the last day of the same term. The writs were directed to the sheriff of *Nottinghamshire*. The objection to them was, that the significavits recited in the writs, described the defendant as *J. H.*, now or heretofore of the parish of *Orpington, in the county of Kent*. The defendant was in custody.

2. The Court will quash such writ on motion before the return day, and will not compel a defendant who has been arrested upon it to sue out a *habeas corpus*.

Sir *W. W. Follett* shewed cause.—(The Court expressed an opinion that the objection taken to the writ was a valid one.) Assuming that to be so, still this application is improperly made; this Court possesses no authority to deal with these writs till after their return; up to that period the jurisdiction over them belongs exclusively to the Court of *Chancery*, whence they issue. Moreover, since the defendant is in custody, the present course is at all events irregular. He ought to have sued out a writ of *habeas corpus*, on the return of which he would have been discharged; *Rex* v. *Dugger* (*c*). Such has always been the practice.

Sir *F. Pollock* and *J. W. Smith*, *contrà*.—The jurisdiction of this Court commences as soon as the writ is inrolled, it then becomes a record of the Court; that must be done before delivery to the sheriff. In *Rex* v. *Ricketts*(*d*),

(*b*) This case was not argued and decided till *Trinity* term, but is inserted here from its connection with the subject-matter of the two preceding cases.

(*c*) 5 B. & A. 791.

(*d*) *Ante*, 294.

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the motion was made before the return-day and no objection was taken. In *Rex* v. *Blake* (*a*) the objection was taken without effect. The Court will not drive the defendant to the expense of suing out a *habeas corpus*, the result of which must be the same as may be attained by the present motion. There is no more reason for compelling the present defendant to sue out a *habeas corpus* than any other defendant in custody under an irregular *ca. sa.* (They were then stopped by the Court.)

Per Curiam (*b*).—We are all of opinion that this rule must be made absolute.

Rule absolute (*c*).

(*a*) 2 B. & Ad. 139.
(*b*) Lord *Denman*, C. J., *Littledale*, *Patteson*, and *Coleridge*, Js.
(*c*) See the two preceding cases.

In re GOMPERTZ.

April 27th.

1. The Marshal has no authority to allow the benefit of the rules to prisoners confined for a contempt. Such indulgence can only be granted by the Court, upon a special application for that purpose.
2. In shewing cause against a rule, affidavits may be filed up to ten days before the term, when cause is actually shewn, although the rule may have been often enlarged.

W. H. WATSON had obtained, in *Trinity* term, 1836, a rule calling upon *Henry Gompertz*, a prisoner, and the Marshal of the Marshalsea, to shew cause why *H. G.* should not be deprived of the rules, and confined within the walls of the *King's Bench* prison. It appeared from the affidavits on which the rule was obtained (*d*), that *H. G.* was in custody in execution, on detainers at suit of several persons, and upon six attachments issuing from the Court of *Exchequer* in Equity, five being for contempt of Court in not paying costs, the sixth for contempt in not putting in an answer to a bill. That *H. G.* was living within the rules in an expensive style, and had been seen at the Epsom races; that the Marshal, on being requested to confine him in the walls, had replied that *H. G.* had paid a large sum to enjoy the rules, and that the Marshal afterwards had procured a certificate of the prisoner's ill health. The affidavits in answer negatived the expensive living, and stated that the health of *H. G.* required the benefit of the rules, and that he had given security to the Marshal to a large amount. They also stated two instances of the allowance of the rules to prisoners for contempt of the Court of *Chancery* in not appearing and not answering. The rule had been enlarged successively to *Michaelmas*, *Hilary*, and *Easter* terms. The affidavits in answer were filed at different periods up to *January*, 1837.

Platt now shewed cause for *Gompertz*. This Court will take cognizance of the conduct of the Marshal, as relating to the custody of the prisoner, upon those proceedings only which have issued out of this Court. The contempts have not been committed in any matter connected with this Court, the indulgence granted cannot therefore be referred to them, and can only be considered upon the same footing as that granted upon ordinary occasions, with respect to which the Court never interferes, because the Marshal is himself responsible. Neither is there any general rule, that persons confined for contempts must necessarily be confined to the walls; that has been assumed on the authority of the case of *Landen Jones* (*e*), but *Hall* v. *Arnold* (*f*) shews

(*d*) These affidavits were not sworn as in any proceedings, nor entitled at all.
(*e*) 2 Str. 817.
(*f*) 2 D. & R. 709.

that the Marshal is not guilty of any dereliction of duty in allowing the rules to a prisoner in ill health, even though confined for contempt. And such appears to have been the practice on other occasions. [*Watson* here objected to any reference to affidavits not filed before *Michaelmas* term.—*Littledale*, J. Affidavits may be filed up to ten days before the term, when cause is actually shewn; such has always been the practice where a rule has been enlarged.] If it be the duty of the Marshal to confine the prisoner to strict custody, he may, on granting indulgence, be called on to pay those costs in respect of which the contempt has been committed; if he be not liable to pay such costs, it follows that he has done nothing wrong in granting indulgence.

Knowles, for the Marshal.—By a rule of *Hilary* term, 28 *Chas. 2*, 1676, it is ordered, "That the Marshal of the Marshalsea of this Court for the time being do not permit any person whatever, remaining in his custody on any action, or in execution, or for any contempt whatsoever, detained within the said prison, or within the liberty of the rules of the said prison, to go out of the said prison or the liberty aforesaid, without a special rule of this Court in that behalf first had and obtained, upon the peril that may ensue." That is the latest rule on the subject; it certainly was contemplated by the framers of this rule, that persons detained for contempt might be permitted to go out of the walls. The Marshal seems to have the same degree of discretion intrusted to him, with respect to persons confined on one ground as on another; and any act of the Court abridging his exercise of that discretion, may, by diminishing the amount of his fees, be the cause of very great loss to him.

W. H. Watson, in support of the rule.—The rule quoted shews plainly both the nature of the Marshal's duties, and in what way he has violated them. He ought not to have permitted this indulgence except under the sanction of a special rule, as was done in *Rex* v. *Bennett* (*a*). This application was made on two grounds: 1st. That the prisoner, being confined for contempt, a matter which cannot be measured by money, had no right at all to the rules. 2nd, That the behaviour of the prisoner amounts to an abuse of the rules.

A prisoner guilty of a contempt is not entitled to the rules; he is confined for the purpose of punishment, as a prisoner confined for a criminal transaction (*b*). The case of *Langden Jones* (*c*) is likened to that of Captain *Hayes*, who was imprisoned for forgery. *Hall* v. *Arnold* (*d*) is an authority in favour of this motion, for the same doctrine is there admitted, both in argument and by the Court. *In re Bryant* (*e*), the Court acted on the same principle, and a rule to deprive a prisoner, for contempt, of the rules was made absolute. In the Courts of Equity the rule is the same; a prisoner for contempt in not doing any thing which cannot be done by another, as for not putting in an answer, is held not to be entitled to the rules. This practice is extended also to contempts for other causes, as appears from the following extract from the Registrar's book: "*Goodwin* v. *Baynes*, 4 *June*, 1741. Prisoner in the *Fleet* for non-payment of money; prisoner had been

(*a*) 4 D. & R. 832.
(*b*) Tidd, 337.
(*c*) 2 Str. 817.
(*d*) 2 D. & R. 709.
(*e*) Supplied by the officer of the Court.

King's Bench.

In re GOMPERTZ.

frequently out of the rules out of term time. Ordered, by the Lord Chancellor, that he be confined a close prisoner within the walls." There is an anonymous case in *Barnardiston*, 374, which is to the same effect; all that appears, from the instances of the opposite practice, is simply that the prisoners were allowed the rules, but we do not know under what circumstances.

As to the second ground upon which this application was made, the circumstances of this case shew, that the indulgence was not granted because of illness; but if it were, the Marshal is not the proper person to decide upon the sufficiency of this ground for indulgence.—[*Coleridge*, J.—What is to be done if the illness occurs during the vacation?]—A single judge might then relieve. The case of *Ruthven* v. *Brown* (*a*) shews that the rules are not to be allowed to prisoners for the purpose of their indulging in dissipation and amusement.

Elderton confirmed the statement made as to the practice observed in the Equity Courts, and stated that the Lord Chief Baron, on application, stated that he should have acted on it, had the prisoner been confined in the *Fleet*.

Lord DENMAN, C. J.—I feel desirous to place this case upon a broad and distinct principle. Whatever may be the degree of liberty with which prisoners may be indulged, who are confined merely for the non-payment of money, I think no inference can be drawn from that in favour of extending the same privileges to persons who in some sort must be considered as criminals. This prisoner being confined for contempt of Court must be considered as guilty of misconduct of a criminal nature; and I think, therefore, that the Marshal is not justified, of his own authority, in granting him any indulgence. In the case of Sir *Watkin Lewes*, the indulgence does not seem to have been opposed, or no doubt the Court would have decided as they do now. I do not enter into any particulars of the prisoner's behaviour, which is said to amount to an abuse of the indulgence. I decide the case on the broad and general ground, that, under the circumstances, the Marshal had no authority whatever to grant him the indulgence.

LITTLEDALE, J.—There is a great difference between prisoners confined for mere non-payment of money, and those confined for a contempt. The treatment of the first having for its object merely to procure payment, may very properly be made the subject of pecuniary arrangement; the treatment of the other class of prisoners stands on a very different principle; they are confined by way of punishment, an object not to be measured by money, and as to which the Marshal has no means of deciding. I think that such parties ought to be confined to the walls, unless this Court, upon application, think proper to grant any indulgence. The rule of *Chas.* 2 has no application; it merely refers to day-rules, and makes no distinction whether a party be within the walls, or within the rules merely.

PATTESON, J.—I think the rule of *Chas.* 2 does not apply. In *Tidd's Prac.* the distinction is taken between prisoners for contempt and other prisoners; and it is laid down that the former cannot enjoy the benefit of the rules, unless upon cause shewn to the Court. *Hall* v. *Arnold* (*b*) stands upon quite a

(*a*) 2 Car. & Pay. 535. (*b*) 2 D. & R. 709.

different footing. I quite concur in what has been already said, a party confined for a contempt is confined as a criminal.

COLERIDGE, J.—The case resolves itself into a short point, whether the Marshal or the Court is to decide as to the propriety of granting indulgence to a prisoner; that may be settled by reference to the object for which he is confined. The object may be either safe custody merely, or partly safe custody, and partly punishment. This prisoner was confined for the latter object, the Marshal therefore had no authority to decide.

Rule absolute.

TERRY *v.* PARKER.

May 6th.

In an action against the drawer of a bill of exchange, who has never, between the time of drawing the bill and its coming to maturity, had effects in the hands of the acceptor:—*Held*, that presentment to the acceptor was unnecessary.

ASSUMPSIT by the indorsee against the drawer of a bill of exchange accepted by one *Twist*. The declaration averred, that the defendant never, from the time of drawing the bill until it became due, had any effects in the hands of the acceptor, nor had reasonable grounds to expect that *Twist* would pay the bill upon presentment, and had not sustained any damage by reason of its non-presentment on the day when due, or by want of notice of such presentment and the dishonor. The declaration also averred a presentment after the day on which the bill had become due, that the acceptor refused to pay, and notice to the defendant of such presentment and dishonor. [There were also other counts, which, as well as the subsequent pleadings relating to them, are immaterial.]

The defendant pleaded, that at the time of making the bill one *Pullen* was liable to the defendant to the amount of the bill, and that there were various money transactions between *Pullen* and the acceptor, upon which the acceptor was indebted to *Pullen*, whereupon *Pullen* requested the defendant to draw, and the acceptor to accept the bill, and that the defendant, believing that the acceptor would upon due presentment pay the bill, did draw upon him the said bill, and that *Twist* accepted it, on account of the liability of the said *Pullen* to the defendant. The plea then averred, that the bill was not duly presented, whereby the defendant is likely to lose the amount for which the said *Pullen* was liable to him.

Replication, that *Pullen* was not liable to the defendant; that defendant did not draw, nor the acceptor accept the bill on account of such liability.

At the trial before *Alderson* B. at the *York* Spring Assizes, 1837, it was admitted that the bill was not presented on the day when it was due, and there was no proof of any presentment afterwards. But it was contended, that as this was an accommodation acceptance, no presentment was necessary. Verdict for the plaintiff.

Cresswell this term (*a*) moved to set aside the verdict and enter a nonsuit, or for a new trial, or in arrest of judgment, on the ground that the declaration had admitted that there had been no due presentment.—The ground on which a presentment in the first instance to an acceptor is necessary, is, that the contract made by other parties to a note is only conditional upon a failure

(*a*) *April* 20, before Lord *Denman*, C. J., *Patteson* and *Coleridge*, Js.

to pay by the acceptor. The Courts have always regretted the existence of exceptions to this general rule, because an inquiry is thereby involved into the particular circumstances of each case. It is not here contended that notice of non-payment of an accommodation bill is required; that has already been decided to be unnecessary; *Bickerdike* v. *Bollman* (*a*), *Walwy* v. *St. Quintin* (*b*). But no case has gone the length of saying that due presentment is unnecessary in such cases. The questions are quite different. In *De Berdt* v. *Atkinson* (*c*), the Court seems to have considered that it was necessary.—[*Patteson*, J.—That case is against you; the Court there held, that presentment on the second day was sufficient, but here it is contended that no presentment at all is necessary.]—The decision can hardly be supported, because it seems to suppose that presentment is not necessary in the case of insolvency, which it certainly is (*d*); and the reason given is, that possibly the friends of an insolvent might pay the bill for him. The same reason is applicable in the present case.—[Lord *Denman*, C. J.—In *Boultbee* v. *Stubbs* (*e*), it is laid down that the bankruptcy of the acceptor does not do away with the necessity for notice.]—In *Hopley* v. *Dufresne* (*f*), an action brought by the indorsee against the indorser of an accommodation bill, Lord *Ellenborough* nonsuited the plaintiff because it had not been duly presented.

Cur. adv. vult.

Lord DENMAN, C. J. now delivered the judgment of the Court.—The question in this case is, whether want of effects in the hands of the drawee excuses the holder of a bill of exchange from the necessity of presenting the bill for payment, as well as of giving notice of dishonor to the drawer. Many cases establish that notice of dishonor need not be given to the drawer in such a case, and the reason assigned is, because he is in no respect prejudiced by want of such notice, having no remedy against any other party on the bill. This reason equally applies to want of presentment for payment, since if the bill was presented and paid by the drawee, the drawer would become indebted to him in the amount instead of being indebted to the holder of the bill, and would be in no way benefited by such presentment and payment. No case directly in point seems to have been decided. The case of *De Berdt* v. *Atkinson* (*c*) was an action on a promissory note against the payee and indorser, who had lent his name, knowing that the maker was insolvent; and it was held that he was not discharged by the note not having been presented till the day after it was due, and notice of dishonor not having been given for several days. But that case can hardly be supported, inasmuch as the defendant was not the party for whose accommodation the note was made; on the contrary, he lent his name to accommodate the maker. Neither is the case of *Hopley* v. *Dufresne* (*f*) an authority the other way; for, although that was a case of an acceptance for the accommodation of the defendant, Lord *Ellenborough* nonsuited the plaintiff, because the bill was presented to the acceptor's bankers after banking hours; yet that nonsuit was set

(*a*) 1 T. R. 405.
(*b*) 1 B. & P. 652.
(*c*) 2 H. Bl. 336.
(*d*) See *Russel* v. *Langstaffe*, Doug. 515; *Esdaile* v. *Sowerby*, 11 East, 114.
(*e*) 18 Ves. jun. 21; and see *Rohde* v. *Proctor*, 4 B. & C. 517, and *Ex parte Rohde*, 1 Mont. & Mac. 430.
(*f*) 15 East, 275.

on the ground of there being evidence of a subsequent waiver, and the point whether the drawer was entitled to object to the want of due presentment was not determined. It appears to us, that the same reason applies to want of presentment as to want of notice of dishonor, and therefore that the same rule ought to prevail with respect to want of effects operating as an excuse, and the rule to arrest judgment must be refused.

Rule refused.

SAXON *v.* GEORGE CASTLE the Elder, GEORGE CASTLE the Younger, and THOMAS BROWNE.

May 1*st.*

In an action on the case for suing out a *ca. sa.*, and arresting the plaintiff for more money than was due, the want of an averment of malice in the declaration is fatal on arrest of judgment.

CASE, for a malicious arrest, tried before Lord *Denman*, C. J. at the *London* adjourned sittings after *Trinity* term, 1835. Verdict for the plaintiff. The declaration stated, that an action was brought by the defendants against the plaintiff in the Sheriff's Court of *London;* which action was settled upon the plaintiff in this action giving a warrant of attorney to have judgment entered up against him in the Court of *King's Bench*, to secure payment of 18*l.* (by four equal payments) and the costs, within four days after the taxation of them by the master; on default of payment, judgment to be entered up for the whole or any part due. The declaration further stated, that although at the time of the grievance only a part, to wit, 12*l.* then remained due, and although the costs had not been taxed, the defendants "*wrongfully and injuriously*" caused a *ca. sa.* to be issued to levy 62*l.* 12*s.*, with expenses &c., which writ the defendants wrongfully and injuriously delivered to the sheriff, who thereupon arrested the plaintiff, &c.

The defendants pleaded, 1st, the general issue, on which issue was joined; and secondly, that at the time when &c., the costs &c. had been taxed at 44*l.* 12*s.*, making, together with 18*l.* then due according to the warrant of attorney, the sum of 62*l.* 12*s.*; whereupon the same remaining unpaid, the defendants, more than four days after the taxation, caused the *ca. sa.* to issue, &c.

Replication, de injuriâ.

At the trial it appeared that the defendant *Browne*, on the 7th of *December*, 1833, attended before the master, as attorney on behalf of the other defendants, in order that the costs might be taxed. No person attended for the plaintiff. The Sheriff's Court costs were not taxed, but the master, supposing that they had been, gave his *allocatur* for 41*l.* 7*s.*, which sum included the untaxed Sheriff's Court costs, debt 18*l.*, costs of judgment 3*l.* 5*s.*, total 62*l.* 12*s.* *March* 12th, 1834, application was made to a judge at chambers for a summons for *Browne* to shew cause why the costs should not be retaxed. The judge refused to make an order without affidavits as to the proceedings before the master, and dismissed the summons, upon which *Browne* immediately signed judgment and issued a *ca. sa.* The learned judge eventually, *December* 23d, made an order for the retaxation of the costs; and the master for that purpose requested the prothonotary of the Sheriff's Court to tax the costs of the action in that court. No notice was given by *Browne* to the plaintiff's attorney of any intended taxation before the prothonotary, nor did he himself ever apply to the prothonotary on the subject; but, *February*

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6th, 1834, the plaintiff was taken in execution under the *ca. sa.* for the 62*l.* 12*s.* &c. At the time the *ca. sa.* issued, no instalments were due, and 12*l.* only was due at the time of the arrest.

In *Michaelmas* term, 1835, *Kelly* obtained a rule to enter a nonsuit, or for a new trial, on the following grounds:—

1st. That it was necessary to prove express malice, which had not been done.

2nd. That the plea was proved.

3rd. That the action was misconceived, and ought to have been for falsely representing to the master that the costs in the sheriff's court had been taxed.

He also obtained a rule to arrest the judgment, on the ground of the want of an averment of malice in the declaration, as to which, he cited *Scheibal* v. *Fairbain* (*a*) and *Mitchell* v. *Jenkins* (*b*).

Swann now shewed cause, and commented upon the evidence at the trial with reference to the two first points; and as to the third point, he urged that the existence of one cause of action did not deprive the plaintiff of relying upon any other, which he might have also. With respect to the point in arrest of judgment, he argued that the words *wrongfully and injuriously* implied malice, and quoted the case of *Wentworth* v. *Bullen* (*c*).

J. Bayley, contrà, argued that the plea was proved, and that the action was misconceived, as it should have been brought for the misrepresentation of the attorney, rather than for the malicious arrest. (As to the point in arrest of judgment, he was stopped by the Court.)

Lord DENMAN, C. J.—I do not see how it is possible for us to say that there is any ground in this case for a new trial, because there certainly was evidence of all the allegations in the declaration, which were put in issue by the plea. I am of opinion also, that the plaintiff has not misconceived his form of action. Still I am not aware of any authority to shew that such an action can be maintained, without an express averment of malice. In the case of *Scheibal* v. *Fairbain* (*a*), where a creditor, who had arrested his debtor, detained him in custody after the payment of the debt, the Court, notwithstanding, held that there ought to have been such an averment. In *Gibson* v. *Chaters* (*d*) the Court held, that it was necessary to prove actual malice. That decision involves an assumption of the necessity for such an averment, otherwise no such necessity could have existed. Although the circumstances proved may afford an inference from which the jury may find malice, that does not shew that the averment of malice may be omitted in the declaration. Many cases certainly have determined that the absence of probable cause is ground from which malice may be inferred, but there are none which intimate that the averment can be dispensed with.

LITTLEDALE, J.—I am also of opinion that an averment of malice was necessary in this declaration. This is not an action of trespass, where upon the

(*a*) 1 Bos. & Pul. 388.
(*b*) 5 B. & Ad. 588.
(*c*) 9 B. & C. 840.
(*d*) 2 Bos. & Pul. 129.

mere statement of the act done, it appears manifestly illegal. There no averment of malice is necessary. But an action in trespass would not have lain in this case, because the defendant had a right to sue out a *ca. sa.*, and, at the time of arrest, to arrest the plaintiff for a certain sum. The complaint is only for suing out the writ for too large a sum: and here no doubt, as in ordinary cases of arrest, for more money than turns out to be due, the arrest must be alleged to have been made maliciously. It might be urged that the defendants, upon the circumstances of the case, could not have acted in ignorance of the facts, and therefore that the arrest must have been a malicious act. All this might have been very strong evidence to lead the jury to arrive at such a conclusion, but still that does not at all do away with the necessity for an averment of malice in the declaration.

PATTESON, J.—I think that there is no ground for a nonsuit or new trial. Under these pleadings the plaintiff was not bound to prove malice, since there was no averment of it in the declaration. I think also that there is no ground for contending that the action is misconceived. It was not the misrepresentation to the master, which caused the injury to the plaintiff; the injury proceeded from the arrest alone. As to the ground for arresting the judgment, I have no doubt that malice is the foundation of this action, and whatever may be the circumstances by which it is proved, or from which it is to be implied, it is equally necessary to aver it.

COLERIDGE, J.—I am of the same opinion. This action is well conceived. The mis-statement to the master was merely a preliminary; the only ground of complaint was malicious arrest, and I have no doubt whatever as to the necessity to aver the existence of malice in the declaration.

Rule absolute to arrest the judgment.

ROBERTS and another *v.* BATE and another.

May 6th.

In an action on a banker's accountable receipt the Court refused to set aside a plea in abatement, or to allow the plaintiffs to amend the writ and proceedings by inserting the name of a person who ought to have been made a co-defendant, although the Statute of Limitations would have barred any fresh action.

WHATELEY had obtained a rule to shew cause why the plea in abatement delivered by the defendants in this case should not be set aside, or why the plaintiffs should not be permitted to amend the writ and proceedings by adding the name of *Thomas Hill.*

It appeared that the action was brought upon a banker's accountable receipt for 2000*l.*, dated March, 1829. The writ of summons was sued out within a few days of the expiration of six years from the date of the receipt. The defendants filed a bill of injunction to restrain the plaintiffs from proceeding, which was afterwards dismissed, and the plaintiffs delivered their declaration. The defendants pleaded in abatement the nonjoinder of one *Thomas Hill.* The affidavits in support of the rule stated, that the defendants by their acts had held themselves out as the only persons liable on this receipt, that the plaintiffs were ignorant that *Hill* was a partner, and that if the plaintiff discontinued this action and brought another, the Statute of Limitations would be a bar. The affidavits of the defendants stated, that the plaintiffs had drawn bills, and also taken receipts before and about the time when the accountable receipt was given, in which *Hill's* name was men-

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tioned together with the defendants, whereby the plaintiffs must or might have known that *Hill* was a partner. There were conflicting affidavits as to the merits.

Sir *J. Campbell*, A. G. and *R. V. Richards*, now shewed cause. The plea in this case has been regularly pleaded and verified by affidavit. The defendants have, by pleading it, become invested with certain rights, of which the plaintiffs cannot be permitted to deprive them.—[Lord *Denman*, C. J.—Is there any authority for such an application as this?]—There certainly is a case, *Lakin* v. *Watson* (*a*), in which such an application was acceded to, but the circumstances of that case were different. The omission was of a nominal plaintiff only, and there was nothing in that case to shew that the justice of the debt was disputed. The Court also stated, that they would not accede to such applications except on very pressing occasions, and where the justice of the case would otherwise be necessarily defeated. But it seems very doubtful whether the Court, under any circumstances, has authority to do so. (They were then stopped by the Court.)

Talfourd, Serjt. and *Whateley*, *contrà*. There is a series of cases in the Exchequer since the period of the new rules, wherein the Court has laid down a distinct criterion to determine when applications of this nature may be granted. The Court will never refuse them when the result would be absolutely to deprive the party of his remedy; *Baker* v. *Nearer* (*b*), *Horton* v. *Stamford* (*c*), *Lakin* v. *Watson* (*a*), *Partridge* v. *Wallbank* (*d*). If this application is refused the plaintiff is shut out for ever. The Court will, therefore, in order that justice may not be defeated, exercise its power of amendment according to the equity of the case.

Lord DENMAN, C. J. (after stating the facts of the case).—From the plea, which is in abatement, it appears that a third party was in partnership with the defendants, and that he has not been made a co-defendant; and now an application is made to the Court to set aside this plea, and thereby put the plaintiffs in the same condition as if their proceedings had been altogether free from objection. But I think that no Court has the power to deprive a party of a defence allowed him by act of parliament; a defence which, as was observed by Lord *Ellenborough*, is often founded on strict justice. We could not grant this rule without a stretch of authority which I should be very sorry to employ, even if it could be assumed that the plaintiff has the justice of the case with him. But it is always very possible that the name of a party may have been omitted for some sinister purpose; and we must always consider the consequences of a decision with reference, not to a particular case only, but to its general application. This rule applies also in the alternative, (but for the same purpose which has been already considered,) to amend the writ and subsequent proceedings by introducing in them the name of *Thomas Hill*. It seems that the earliest authority which can be found in support of such an application is in the year 1832. Now I cannot doubt but that from the time of the passing of the Statute of Limitations down to 1832, many parties simi-

(*a*) 2 C. & M. 685; *S. C.* 2 Dowl. P. C. 633.
(*b*) 1 C. & M. 112; 1 D. P. C. 616.
(*c*) 1 C. & M. 773; 2 D. P. C. 96.
(*d*) 1 M. & W. 316.

larly situated with the plaintiffs have been desirous to evade the consequences of a plea in abatement, by applications such as the present; and, as no case can be found in which such applications have been granted, it does appear to me that this absence of authority raises a strong presumption against the propriety of granting them. It is true that the Court of Exchequer, in the case of *Lakin* v. *Watson* (*a*), did accede to such an application, although they refused a similar one in *Partridge* v. *Wallbank* (*b*). I am always most desirous to follow the authority of that Court, but when either of the parties contending together in an action has become clothed with certain defined rights, I must say that in my opinion no Court has the power to divest him of those rights. I feel, therefore, that we should not be justified in making absolute this rule in either of its branches. It has been argued, that the situation of the plaintiff is such that the equity of the case demands our interference in the manner prayed. Equity, however, is not a ground upon which we are authorised to decide; and without saying whether under the present circumstances the plaintiff has or has not been guilty of any negligence, I am of opinion, on general grounds, and because this Court possesses not the means of doing justice on equitable terms, that this rule must be discharged.

LITTLEDALE, J.—I am of the same opinion. I think that this Court has no power to set aside the plea. Whether such an application as the present should be granted in the case of mere verbal mistake, is a question which does not now arise. In a case in 1 *Bos. & Pul.* 481, (*c*) the Court only said that the capias might be amended with the consent of the defendant.

PATTESON, J.—The present motion, although put in the alternative, has substantially but one object, namely, to get rid of a plea which the defendant was certainly entitled to put on the record. Now, by the stat. 3 & 4 *W.* 4, c. 42, certain restrictions are placed upon pleas in abatement, and such pleas are, in certain cases, completely abolished. After the subject of these pleas has so distinctly and so recently been considered by the legislature, I cannot think that we have any authority whatever to alter or extend their enactments. It is true, that in *Lakin* v. *Watson* (*a*) the Court of Exchequer did allow, under similar circumstances, an amendment to be made similar to that now prayed for, and on the ground that the plaintiff would otherwise lose his remedy. But with all possible respect for the opinion of that Court I do not understand why the amendment should have been allowed in that case more than in any other, where justice and equity may require amendment. One very obvious objection to our entertaining such applications as the present, is, that we should have to decide upon the due weight to be given to a number of conflicting affidavits. The present case affords a strong instance of this very objection, for at this moment I am wholly unable to say with which party the justice of this case is. The question is altogether different, whether or not we ought to accede to such an application, where, merely in the names of the parties or otherwise, there may exist some trifling error. Under the present circumstances the rule must be discharged.

Rule discharged.

(*a*) 2 C. & M. 685; *S. C.* 2 Dowl. P. C. 633.

(*b*) 1 M. & W. 316.

(*c*) *Tabrum* v. *Tenant.*

King's Bench.

MAYALL and others *v.* MITFORD and others.

May 2d.

1. A policy of insurance against fire of certain cotton mills worked by steam, contained a warranty that the *mills* should work by day only;—*Held*, that the warranty meant that the ordinary manufacture should be carried on by day only, and therefore that the working of the engine alone by night for the purpose of communicating power to some machinery in a neighbouring building, was no breach of the warranty.

2. Plea, to a declaration on the policy, that the steam engine and certain shafts being parts of the mill, had worked by night and not by day only, is bad in arrest of judgment, as there might be a working of parts of the mills, and yet no working of the mills within the meaning of the warranty.

ASSUMPSIT on a policy of insurance against fire of certain cotton mills worked by steam, premises and machinery, &c. The policy contained a warranty that the mills were "worked by day only." The defendant pleaded several pleas, but the only question in the case turned upon the plea alleging that the fire was occasioned by working "the steam engine, shafts, and part of the mills by night, and not by day only."

Replication, (on which issue was joined) that the steam engine and shafts were not part of the mills, and "were not worked by night and not by day only." At the trial before Lord *Abinger*, C. B. at the *Liverpool* Summer Assizes, 1835, it appeared that the mills were worked by means of a steam engine with upright shafts, and that a horizontal shaft, connected with one of such upright shafts, passed through the wall of the factory, and was connected with some machinery in neighbouring premises, not part of the premises insured, for the purpose of communicating power from the engine: that the steam engine was worked for this purpose on one occasion at night, when the persons employed in the mill were not in attendance, and the ordinary manufactory of the mill was not going forward, after the policy had been effected. Verdict for the defendants on the above issue.

Blackburne, in *Michaelmas* term, 1835, having obtained a rule nisi to enter judgment for the plaintiffs, notwithstanding the verdict found for the defendants, on the ground that the plea was bad in not alleging that the mills themselves, instead of the shafts being parts only of the said mills, had been worked by night,

Cresswell, *J. L. Adolphhus*, and *W. H. Watson*, now shewed cause.—The policy contains an express warranty that the mills are not to be worked by night; and every warranty must be performed literally, although it is sufficient if a mere representation be performed in substance; Lord *Mansfield* in *De Hahn* v. *Hartley* (*a*). This distinction is an answer to any argument to be derived from *Dobson* v. *Sotheby* (*b*), in which case the question was raised upon matter of description. In *Shaw* v. *Robberds* (*c*) also the point was, whether the premises insured and the business carried on therein had been correctly described; it was not contended that any warranty had been violated. *Whitehead* v. *Price* (*d*), which was an action upon another policy of insurance of the same premises, as in this case, is no authority for the plaintiffs, because the plea did not state that the engine, worked by night, was any part of the mill. The omission in that plea has been cautiously supplied in the present plea, which avers that the steam engine and shafts were parts of the mill. A warranty that the mill shall not work at a particular time must restrain any part of the mill from so working, or can it be said that the warranty is not broken unless by the working of every part. In marine insurances any deviation of the ship insured would constitute an infringement

(*a*) 6 T. R. 343.
(*b*) M. & Malk. 90.
(*c*) *Ante*, 94.
(*d*) 2 C. M. & R. 447; *S. C.* 1 Gale, 151.

of the warranty; or if a ship be warranted copper fastened, the condition is unfulfilled if any part of it be not copper fastened.

Sir *J. Campbell*, A. G. *contrà*.—The question in all these cases is, what was the stipulation understood and entered into by the parties. The warranty here was, that the mills should not work by night; the meaning of which is, that these mills being cotton mills, should not work by night in the manner in which cotton mills ordinarily do; that is, should not carry on the manufactory which was the object of the mills by night. The stipulation is not that no parts whatever of the mill should move during the night: it might be absolutely necessary that they should for the purpose of repairs. The plea therefore is bad, it alleges no breach of the warranty. The averment ought to have been that the mills themselves worked by night. The defendant might then have proved the circumstances, and the jury would have found whether they supported the averment. Where there is a warranty that a ship shall not sail without convoy, she may nevertheless sail without convoy to the place of rendezvous. This could not be allowed, if the principle contended for on the other side is correct.

Lord DENMAN, C. J.—The Court of Exchequer held, in the case of *Whitehead* v. *Price*, that, unless the mill was at work as a mill, for the purpose of carrying on the cotton manufactory, there was no breach of the warranty. The question here is, whether this plea is good, the warranty being that the mill shall not work by night, and the plea being that the warranty is broken, because parts of the mill did work at night. It does not necessarily follow, because any part of a mill is working, that therefore the mill is working. On the contrary, it is easy to understand how a single part of the mill may be at work, and yet the mill not at work. For instance, suppose there was a pipe to supply water; that might be at work at all hours of the night to supply the water necessary for the working of the mill in the day time; so far there would be a working of the mill at night, but we could not say that it was a working of the mill within the meaning of the warranty. Therefore the averment in the plea furnishes no defence to the action, and there is no other averment alleging in the terms of the warranty any breach whatever. The judgment must therefore be entered for the plaintiffs.

LITTLEDALE, J.—I am of the same opinion. The terms of the warranty are, that the mill should not be worked at night, that is the essential part of the warranty; the proper plea would have been that the mills were worked by night. Then if issue had been taken thereupon, it would have appeared whether the mill had been worked by night or not. It may happen that the shaft and steam engine may be at work at night for the use of the mill by day, and in that case it could not be said that the mill itself was at work at night. It is not enough to say that part of the mill was worked at night. It is true that the mill cannot go on unless these particular parts do work, still they do not constitute the mill within the meaning of this warranty. That is clear from the warranty itself, because under the terms of it, if the people of the mill had been in attendance and employed there by night, for the ordinary purposes of the manufacture, that would have been a sufficient breach, although it were not proved that all the parts of the mill were going.

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PATTESON, J.—The warranty is, that the mill shall be worked by day only. What then is the meaning of the mill being worked by day only? In pleading a breach of a warranty, it is generally advisable to plead in the very words of the warranty. If this plea had been that the mill was worked by night, it would have been a good plea, and the only question then would have been whether it was established by the evidence. I do not mean to say, that if the plea had stated facts to shew that the work which was ordinarily done by day was carried on by night, it might not have been a good plea, although the very words of the warranty were not used. This plea, however, does not state any thing of the kind; the words are, that the steam engine and shaft, being parts of the mill, were worked by night. Now that is ambiguous; it may be that they were worked for the purpose of carrying on the cotton mill, or it may be that they were merely turning round for some other purpose. I think, therefore, that the plea is bad, as it does not shew that the mill was worked by night.

COLERIDGE, J.—As this plea sets out facts on which it relies as a breach of the warranty, it is bad if it does not shew such breach on the face of it. Now even if all the facts stated in it were true, the warranty still might not have been broken. The question is, what is the true construction of the warranty? I take it to be that the usual manufacture in such mills shall not be carried by night, but by day only. I do not mean to say that every part of the process must be in operation to create a breach of the warranty, but generally that enough must be done to maintain, according to the common acceptation of the term, the allegation that the mill was at work. In this case it is merely stated that some of the shafts were turning round, and that took place at the time when the persons employed in the mill were absent, and when there was no process going on for the manufacture of cotton. It is quite unreasonable to say, under those circumstances, that there was a working of the mill by night; and I think, therefore, that this plea is bad.

Rule absolute to enter the verdict for the plaintiffs.

TEBBUTT *v.* SELBY.

May 6th.

In case for wrongfully obstructing plaintiff in the rightful use of a cistern, the declaration stated that the defendant wrongfully locked up a door-way leading to the cistern, and thereby hindered the plaintiff from having access to the cistern. The pleas traversed the right to use the cistern, on which issue was joined and found for the plaintiff. The judgment was afterwards arrested, because the declaration did not disclose any right of passage to the cistern through the door-way obstructed, either directly or by shewing that there was no other way.

THAT whereas the plaintiff before and at the time of the committing of the grievance by the defendant, as hereinafter next mentioned, was, and from thence hitherto hath been, and still is, lawfully possessed of certain rooms and apartments in and parcel of a certain dwelling-house, situate and being in the county of Middlesex, and in which said rooms and apartments he the said plaintiff then inhabited and dwelt, and still doth inhabit and dwell with his family, and the plaintiff during all the time aforesaid ought to have had, and still of right ought to have for himself and his family inhabiting and dwelling in the said rooms and apartments, at all seasonable times, the liberty and privilege of taking water from and out of a cistern, situate and being in the said dwelling-house, and the use, benefit, and enjoyment of

such cistern; and also the privilege of using a certain dusthole, situate and being in the said dwelling-house, for the purpose of throwing and depositing therein such ashes, dust, and dirt, as might be made and accumulated in the said rooms and apartments: yet the defendant, well knowing the premises, but wrongfully and unjustly contriving and intending to injure the plaintiff in this behalf, and to deprive him of the use, benefit, and enjoyment of the said cistern and dusthole respectively, heretofore, and whilst the plaintiff was so possessed of his said rooms and apartments as aforesaid, to wit, on the 1st of May, 1836, and on divers other days and times between that day and the commencement of this suit, wrongfully and injuriously locked and fastened, and caused and procured to be locked and fastened up, a certain door and door-way, situate and being in the said dwelling-house, and leading to the said cistern and dusthole respectively, and kept and continued the same so locked and fastened up for a long space of time, to wit, from thence until the day of the commencement of this suit, and thereby, for and during all that time, continually hindered and prevented the plaintiff and his family from having access to the said cistern and dusthole respectively, and wholly hindered and prevented the plaintiff and his said family from taking any water from the said cistern, and wholly excluded them from the use, benefit, and enjoyment of the said cistern, and also the privilege of using the said dusthole for the purpose aforesaid; and he the said plaintiff and his family, by means of the said several premises, could not, during any part of the time aforesaid, obtain or procure any water from the said cistern, or have or enjoy the use and benefit of the said cistern and dusthole, or either of them, as they of right ought to have done and otherwise might and would have done; and he the plaintiff hath been, by means of the premises aforesaid, entirely deprived of the use, benefit, and enjoyment thereof.

Plea, denying the right to use the cistern and dusthole, and issue thereon.

At the trial before *Coleridge*, J., at the Middlesex sittings after Michaelmas term, 1836, a verdict was found for the plaintiff.

Peacock having obtained a rule nisi for arresting the judgment, on the ground that the declaration did not disclose any right to use the door-way, the obstruction of which was complained of, and that there might have been some other way to the cistern;

Sir *J. Campbell*, A. G. and *Jervis*, shewed cause.—It was not necessary that the declaration should set out any distinct right to use the door-way, for the gist of this action is the hindrance offered to the plaintiff in his use of the cistern; and the mode of hindrance by obstructing the door-way leading to the cistern need not have been alleged at all. The pleas admit the obstruction of the door-way, and the right to pass through that way; the only right traversed, is the right to use the cistern. If the plaintiff had substantively claimed a right of way, it would have been necessary that he should have claimed it in distinct terms; but the door-way is here introduced quite incidentally, for the purpose of shewing the manner of the obstruction complained of. The declaration states, that the defendant *wrongfully* locked up the door leading to the cistern, and *thereby* hindered the plaintiff, &c. The word "wrongfully" manifests the plaintiff's right of way, and the words "thereby hindered" that there was no other way to the cistern. If there could have been any doubt as to the sufficiency of those words which allege

a right of way, the Court will make every presumption in the plaintiff's favour after verdict. The defendant might have pleaded the general issue, and shewn that the obstruction was not wrongful.

Peacock, contrà.—Perhaps a general statement that the plaintiff was obstructed in his use of the cistern would have been sufficient. But since the plaintiff has chosen to say that he was obstructed by the locking up of a door-way, the mode of obstruction has become material, and the allegation of it is insufficient, unless it shew that the obstruction was wrongful. For aught that appears, it might have been a door of the defendant's leading to the cistern, which he locked up. A declaration setting up a right of common, and then alleging that the defendant locked up a certain gate leading to the common, and so hindered the plaintiff &c., would be defective; for the gate locked up might be the defendant's own gate upon his own premises. This is a parallel case. The plaintiff should have alleged that he had a right to use the cistern, and that by reason thereof he had a right to pass through the door-way in question. So a rector, in an action for obstructing him in carrying away tithes, must allege the right to the tithes, and that by reason of such a right he is entitled to a certain way.

Against a wrong-doer the general averment—habere debet, the thing demanded, is, no doubt, enough; *Com. Dig.* Pleader, (C 39); 1 *Wms. Saunders*, 346, n. 2; *St. John* v. *Moody* (*a*). But there is no such general averment here, and the omission is not cured by verdict, *Blyth* v. *Topham* (*b*). It is said, that the general issue would have traversed that the door was *wrongfully* locked; *Frankum* v. *Earl of Falmouth* (*c*) shews that is not so. Even if there were no other way to the cistern except through this door, it does not on that account follow that it could be claimed as a way of necessity. The right to a way of necessity arises from an implied grant; the title to such a right must be set out in a plea, and the right must be claimed by an habere debet, even in a declaration; 1 *Wms. Saunders*, 323, n. 6, and *Bullard* v. *Harrison* (*d*), where the point arose on general demurrer.

The defect in the declaration is not helped either by the statutes of jeofails, or by the verdict. It is not helped by the statutes, for it is matter of substance, nor by the verdict, for there was no issue as to the obstruction. The issue was simply on the right to use the cistern, and did not require the plaintiff to prove any right to the door-way. The verdict then not applying to the door-way, there has been judgment by default as to so much of the declaration as relates to that way. The 4 & 5 *Anne*, c. 16, s. 2, curing imperfections in pleading after judgment by default, extends to such imperfections as were previously cured by verdict under the statutes of jeofails, that is, to imperfections in form, and not to such as are cured by a verdict at common law. After judgment by default, therefore, this question stands exactly as if it arose on general demurrer, and on general demurrer this declaration would certainly be held bad for alleging no right to that way, of which the obstruction is complained of as an injury. The law on this subject is collected in *Com. Dig.* Pleader, (C 86), and 1 *Wms. Saunders*, 227, n. 1, to *Stennel* v. *Hogg*.—[*Patteson*, J.—Is not the statement that the defendant wrongfully locked up the door, and thereby hindered the plaintiff

(*a*) 1 Vent. 275.
(*b*) Cro. Jac. 158.
(*c*) 2 Ad. & Ell. 452; *S. C.* 1 Har. & Wol. 337.
(*d*) 4 Maul. & Sel. 387.

&c., an informal averment that the plaintiff had a right to go through the door, as in *Corbyson* v. *Pearson* (*a*)? In that case a party, after prescribing a right of common for cattle levant and couchant, stated that he put in his cattle, under the prescription utendo communia sua prædicta, without saying that they were levant and couchant; and the defect was cured by the statute.]—That was a different case; the right was set out correctly, but the user of the right was imperfectly stated.

Lord DENMAN, C. J.—This is not an application to arrest judgment after verdict, but after judgment by default; because, the pleadings not having in any way raised the point now under consideration, no verdict could have been given upon it. We cannot therefore import into this case the doctrine relative to the intendments to be made after verdict, but must deal with the objection to the declaration exactly as if it were made on general demurrer. I entertain some doubt whether upon general demurrer a declaration would be sufficient, which stated in general terms that the plaintiff was obstructed in his rightful enjoyment of the cistern; although it might be sufficient after verdict, because it would be presumed that the jury had been informed of the particulars constituting the obstruction, and had decided upon them; but here the plaintiff states the particular mode in which the obstruction took place, and has thereby made that mode material. Do then the facts of the alleged obstruction necessarily constitute any injury? The door obstructed might have been in the room of the defendant himself; to shew, therefore, that it was wrongfully obstructed, the plaintiff should have alleged that he had a right to pass through it. I thought at one time that we might intend after verdict that the door stopped up was not an intermediate door-way at all, but a door connected with the cistern itself. On consideration, however, it appears to me that this would be too much to surmise. The rule for arresting judgment will therefore be made absolute.

LITTLEDALE, J.—A general statement of the obstruction would be good after verdict; but so much of this declaration as relates to the obstruction has been pleaded over to. The verdict then found for the plaintiff on the issue, which is only as to the right to use the cistern, does not touch the question of obstruction. That question stands as if judgment by default had been suffered upon it, and must be dealt with as if it arose on general demurrer. Does the averment then, that the plaintiff was prevented from using the cistern by the obstruction of a door leading thereto, necessarily imply that he had a right to go through that door? I think not. The rule for arresting the judgment, therefore, must be made absolute.

PATTESON, J.—I at first thought there was nothing in Mr. *Peacock's* objection, but I am now persuaded by his ingenious argument that he is right. The complaint is either of an obstruction to the plaintiff's right of access to the cistern, without stating in what way it is to be approached, or of an obstruction to a way which he has a right to use. In the former case, it is like the instance put of a declaration for obstructing the plaintiff in his right of common by locking up a certain gate leading thereto, which declaration clearly would be insufficient, for it could not be assumed that there was no

(*a*) Cro. Eliz. 458.

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other approach to the common, or that the plaintiff had necessarily a right to go through the gate so locked. The rule is, that a right must always be alleged in that mode of access which has been obstructed; and the obstruction must not be charged generally, or it will be bad on general demurrer. Secondly, suppose the complaint is of an obstruction to the way which the plaintiff has a right to use, the declaration ought, beyond all question, to assert a right to the way. The allegation, that the defendant obstructed the door "leading to the cistern," and thereby hindered the plaintiff from taking water from the said cistern, is, it has been contended, an assertion, although informal, of the plaintiff's right to use the cistern, and to get at it by means of the door in question. But this allegation does not occur in that part of the declaration where the plaintiff's rights are set out, but merely in the breach as descriptive of the injuries which he has sustained. It would be a forced construction therefore of this declaration, to interpret it as claiming any right to the particular way obstructed; the plaintiff might, consistently with every one of his allegations, have a right to use the cistern, and yet no right of access to it through the door-way obstructed.

Rule absolute.

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Defendants were indicted for a nuisance committed by the erecting of planking &c., within the limits of a harbour. A special verdict found that, in consequence of the erection of the planking, the harbour in some extreme cases was rendered less secure:—*Held*, that consequences so slight and uncertain and rare, as were stated by this special verdict, were not sufficient to constitute a nuisance.

THIS was an indictment for a nuisance. The trial took place before Lord *Denman*, C. J., at the Yorkshire Summer Assizes, 1833, when a special verdict was found, which stated the following facts. That during all the time within mentioned there was an ancient port and harbour, commonly called the Harbour of Scarborough, in the county of York, much used and frequented for the purpose as well of shelter as of repairs for ships and vessels navigating along the northern coasts of this kingdom; and that the prosecutors of the within mentioned indictment are the commissioners for doing and executing the powers and authorities contained in certain acts of parliament hereinafter mentioned. That by the 5 *Geo.* 2, "An Act to enlarge the Pier and Harbour of Scarborough in the county of York," reciting that the harbour of the ancient town corporate of Scarborough, in the north riding of the county of York, was the only place between the port of Newcastle-upon-Tyne and the river Humber capable of receiving in distress of weather ships navigating to and along the northern coasts of this kingdom, and to and from the eastern seas and other places, without great difficulty, and also reciting that the enlarging and extending the piers of the said port would render the same much more commodious than they then were for the reception of large vessels, and particularly those using the coal trade in tempests and other times of danger, certain duties were granted for the purpose of enlarging, extending, improving and keeping in repair the piers of the said port; that by a certain other act of parliament passed in the 25 *Geo.* 2, after appointing commissioners to execute all the powers and authorities in the said act contained, it was (amongst other things) enacted, that for keeping the said harbour clean, and also for preventing the sand and sullage from collecting and gathering there, and that the said harbour might be rendered as capacious as possible, no person whatever should throw or empty any ballast, dust, earth, ashes, rubbish, or stones into the said harbour; or lay therein any logs or floats of

wood or timber, or other materials; or set up any posts therein, or otherwise encroach upon the said harbour; or do, or cause or procure to be done any other act, matter, or thing whatever, to prejudice or annoy the same, and that the matter of such prejudice, encroachment, or annoyance, should be examined into by the said commissioners for the time being, or any two or more of them, who were thereby empowered to inquire into every such offence, and to impose any fine or fines not exceeding *5l.* upon any person so offending, to be levied by distress or imprisonment, as therein mentioned. That by the 41 *Geo.* 3, it was, amongst other things, recited, that the said harbour had been greatly improved; and by the 46 *Geo.* 3, after reciting, amongst other things, the last-mentioned act of parliament and certain other acts of parliament relating to the said port and harbour, and also reciting that the said harbour had been greatly improved under and by virtue of the powers and provisions contained in the said acts, by the commissioners acting in the execution thereof, it was, amongst other things, enacted that the said commissioners for the time being, or any seven or more of them, should be, and they were by the same act empowered to purchase any buildings, lands, tenements, or hereditaments which they should judge necessary and proper to be purchased for the improving, widening, or extending the said port and harbour; or for making or erecting any quay or quays, wharf or wharfs, or for erecting or making any building or buildings, or for any other the purposes of the said acts, or any of them; and that in case the owners, proprietors, or occupiers, or other persons interested in any lands, tenements, or hereditaments which the said commissioners should judge necessary or proper to be purchased, taken, or used for the purposes of the said act, should refuse to treat, or should not agree in the premises, or by reason of absence or otherwise should be prevented from treating, then and in every such case it should be lawful of the said commissioners to cause a jury to be summoned in manner in the said act mentioned, to assess and decide what damages should be sustained by, and what recompence and satisfaction should be made to such owner, proprietor, or other person or persons interested for or on account of the taking or using of such lands, tenements, and hereditaments, for the purposes of the said act; and the verdict and inquisition of such jury are, by the said act of parliament, declared to be final, binding, and conclusive to all intents and purposes whatsoever, against all parties and persons claiming in possession, reversion, remainder, or otherwise: and it is by the said act enacted, that all and every such owners, proprietors, occupiers, and persons in anywise interested in such lands, tenements, and hereditaments, should be from thenceforth, to all intents and purposes, divested of all right, title, claim, interest, or property, of, in, to, or out of the same. That by the 3 *Geo.* 4, it was, amongst other things, recited that the said harbour of Scarborough had been greatly improved, a new western pier erected and completed, and the accommodation and security afforded to ships and other vessels resorting to or passing the said harbour had been greatly increased. That, and subsequent to the year 1817, the said commissioners for carrying into execution the said acts of parliament, with a view to improve and preserve the said harbour, did cause the same to be excavated, by removing divers large quantities of sand from the bottom thereof, and thereby the said harbour has been deepened about four feet all

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along the upper part of the harbour; and that this process of excavation and deepening was carried on by the said commissioners, amongst other places, within from ten to twenty feet of and immediately before the line of the piles hereinafter mentioned. That in the year 1819, the said commissioners, with a view further to improve the said harbour, removed a pier called an Island Pier, which had previously stood in the said harbour, and in the year 1820 erected or completed the pier called the Western Pier, being the same mentioned in the foregoing act 3 *Geo.* 4; and that by such excavation the said harbour was materially improved and rendered more secure and commodious for shipping. That for many years previously to 1817, the defendants within named were, and thence have been, and at the respective times of committing the acts within complained of were the owners of certain premises on the edge of the upper part of the said harbour, which premises during the time hereinbefore mentioned had been used and enjoyed by the said defendants as a ship-building yard, and for the purpose of building and repairing ships therein; and for 200 years last past and upwards had been used and enjoyed in like manner and for the like purpose, by the owners thereof for the time being. That during the space of seventy years last past and upwards, divers piles have been placed and driven into the sandy bottom in the face of the said yard and premises of the said defendants, upon which said piles, plank stages, during all the time aforesaid, have been erected and placed by the owners for the time being of the said yard and premises, and timber and other materials used in building and repairing ships kept thereon; and the same, during the time aforesaid, have been and are proper and necessary for the purpose of carrying on the business of building or repairing ships on the said yard and premises. That until the planking of the same by the defendants hereinafter mentioned, the said piles had always stood at certain distances from one another, and that the water might flow freely between them, and might spend itself on the sloping beach. That the said defendants, in order to protect their said premises, afterwards, to wit, on the 1st day of January, 1826, and on divers other days and times between that day and the 1st day of January, 1828, connected together the said piles by nailing transverse planks from pile to pile, and inclosed the area contained within the said piles, the same being thus rendered impervious to the tide, and presenting perpendicular lines of frontage five feet high from the sand, and at ordinary spring tides there is now at high water a depth of from two to three feet of water against and along the said frontage. That by the aforesaid works of the said commissioners a greater rush of tide was and thence hath been caused to and against the beach and land in front of the said ship-building yard and premises of the said defendants, than had ever previously been experienced, insomuch that by reason thereof the sand was washed down from before the front of the said yard and premises of the said defendants, and the said yards and premises and their plank stages aforesaid, at the times of the said defendants committing the said acts within complained of, had become and were thereby in danger of being swept away by the sea. *That by the defendants' works the harbour is in some extreme cases rendered less secure.* That the defendants have done nothing more than is necessary to protect their property against the sea in consequence of the alterations made by the commissioners.

The case upon this special verdict came on to be argued in Trinity term, 1836 (*a*).

Alexander, for the prosecution.—The question is, whether the defendants can, by erecting what is a public nuisance, protect their premises against a possible damage occasioned by the lawful act of the commissioners. The acts of the commissioners were lawful, and have been successively recognised by the statutes referred to in the special verdict, especially in the 3 *Geo.* 4, which recites what they have done, and declares it to have been for the benefit of the harbour. It is no answer to the indictment to say that the commissioners have done that which under other circumstances would have been a nuisance. *Rex* v. *Pease* (*b*) shews the efficacy of a legislative permission to commit what would otherwise be a nuisance; and *Rex* v. *Russel* (*c*) establishes the proposition that the improvement of the harbour for the public must be treated as a balance to the inconvenience to an individual. But even if that were not the case, and if it were possible that the commissioners might be punished as wrong-doers, that would not justify the defendants in what they have done. The verdict finds the act of the defendants to be a nuisance. Now nuisances by private individuals in public harbours are distinctly prohibited under any circumstances (*d*). With respect to harbours, the principle is most strictly enforced, that the jus privatum is subject to the jus publicum; *Attorney-General* v. *Burridge* (*e*), and *Attorney-General* v. *Parmeter* (*f*). Under no circumstances, therefore, can the defendants justify what they have done on the ground of protection to their property

Cresswell, for the defendants.—The question in fact here is, whether the defendants are to be deprived, by the act of the commissioners, of the use of property which has been in their family for above 200 years, and to be deprived of it without compensation. This indictment cannot be sustained, for the special verdict does not find that the place where the planking has been erected is within the harbour, nor indeed that any act done by the defendants has been done within the limits of the harbour. Every count of the indictment charges the defendants with an offence within the harbour, and the special verdict therefore does not support the indictment. On the special verdict the defendants are not shewn to have committed any indictable offence. The defendants have done nothing here which they were not entitled to do for the protection of their own property. The commissioners here cannot do more than might have been done by a private individual under a grant from the crown, and it is clear that as against him the defendants would have had a right to protect their property from destruction.

Alexander, in reply.—The want of a direct statement in the special verdict, that what the defendants did was within the limits of the harbour, is supplied by other statements in the special verdict, which lead inevitably to the same conclusion. The finding that the harbour is left less secure in time of tempest

(*a*) Before Lord *Denman*, C. J., *Littledale*, *Patteson*, and *Williams*, Js.
(*b*) 4 Barn. & Ad. 30.
(*c*) 6 B. & C. 566.
(*d*) Hale de Port, 83, 84, 85; and De Jure Maris, 36.
(*e*) 10 Price, 350.
(*f*) 10 Price, 378.

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is itself sufficient to shew that the defendants have committed a nuisance to the port and harbour. What the commissioners did was done for the public benefit under the authority of acts of the legislature, and the defendants had no right, though perhaps suffering inconvenience from those acts, to protect themselves by doing something which amounted to a deterioration of a public harbour.

Cur. adv. vult.

Lord DENMAN, C. J. in Hilary term, 1837, delivered the judgment of the Court as follows:—This is an indictment for an alleged nuisance in the harbour of Scarborough. The indictment in all the counts charges the defendants with having erected or continued certain piles and planking in the harbour, and thereby obstructed and rendered it insecure. The special verdict in substance finds that the defendants are owners of premises used as a yard for ship-building, on the edge of the upper part of the harbour: that the piles in question have been erected and driven into the sandy bottom, in face of the said yard and premises, during the space of seventy years, and that the water might flow between the piles, until the planking was placed there. It then finds that the commissioners, under certain acts of parliament, erected works and deepened the harbour, so as to cause a greater rush of water against the defendants' premises than formerly, to the extent of washing away the soil, and threatening destruction to their building-yard: that the defendants, in order to protect their property, placed transverse planking in front of the piles, and have done nothing more than was necessary to protect their property against the sea, in consequence of the alterations made by the commissioners. It then finds, that by the defendants' works the harbour is in some extreme cases rendered less secure. The Court has considered much whether this verdict is not so imperfect as to make it necessary to award a venire de novo, but, upon the whole, we think that the facts are so found as to enable us to give our judgment upon them. It is not indeed expressly found that the piles or planking are in the harbour at all, which is the charge in the indictment; but, assuming that this may be collected from the whole verdict, the question will be, whether the effect produced by them is sufficiently described to enable the Court to say that the defendants' works are in law a nuisance. Doubtless the expression, that by the defendants' works the harbour is in some extreme cases rendered less secure, is vague and indefinite, but it is sufficient to convey to the mind that the defendants' works, even when other causes concur with them, and produce their worst result, do but diminish the security of the harbour, possibly in the least possible degree, on very rare occasions, and under undefined cumstances.

Now without deciding at all how far the conduct of the defendants could under the circumstances be justified, if their works of themselves injured the harbour or rendered it insecure, or, even if combined with other things, they had that effect generally, we think that the jury must be taken to ask by their special verdict for our decision, whether such consequences as are therein stated must amount to a nuisance. We do not think they must, but hold, on the contrary, that no person can be made criminally responsible for consequences so slight, and uncertain and rare, as are stated by this verdict

to result from the works of the defendants. A verdict of not guilty must accordingly be entered.

A verdict of not guilty was entered accordingly.

STANNARD *v.* FORBES and another, Executors of JOHN LOCKE.

April 26th.

THIS was a special case for the opinion of the Court. A declaration in covenant was set out, which stated, that by an indenture dated 26th February, 1825, between *George Scott*, guardian of *Georgiana Scott*, of the first part; *Seanah Stoe Clement*, of the second part; and *John Lock*, of the third part; the said *George Scott*, as to one undivided moiety of a messuage &c., and *Seanah Stoe Clement*, as to the other moiety, demised the said messuage &c. to *John Lock*, to hold, as to the first moiety, from 25th December then last past, for eleven years, if *Georgiana* should so long live; and as to the other moiety, for the same time, if *Seanah Stoe Clement* should so long live; and that, by virtue of such indenture, *John Lock* entered into and was possessed of the said messuage &c., for the said term &c; and that afterwards, by indenture dated 21st September, 1826, between *John Lock*, of the one part, and the plaintiff of the other part, reciting that *George Scott* and *Seanah Stoe Clement* had demised the said messuage &c. to the said *John Lock*, his executors, administrators, and assigns, *for the term of eleven years, from the 25th December then last past*, and reciting that *John Lock* had agreed to sell to the plaintiff the said messuage &c. demised by the said indenture therein recited, for "the residue of the said term of eleven years," *John Lock* did grant, bargain, sell, assign, transfer, and deliver unto the plaintiff, his executors &c. the said messuage &c., to have &c., unto the said plaintiff, his executors &c., from 29th September then next ensuing, during all the rest, residue and remainder, which should be and then to come and unexpired of the said term of eleven years therein expressed. Covenant by *John Lock*, for himself and his executors &c., that for and *notwithstanding any act, deed, matter or thing whatsoever, by him the said John Lock, at any time theretofore made, done, committed, or knowingly occasioned, suffered, or omitted, to the contrary*, the said thereinbefore in part recited indenture of lease was at the time a good, valid, and effectual lease in law and in equity, of and for the premises thereby demised: *and that the same, and the term of eleven years therein expressed, were respectively in full effect, and in nowise forfeited, surrendered, assigned, determined, or otherwise become void or voidable, or prejudicially affected in any manner howsoever otherwise than by effluxion of time:* and that the rents &c. by the therein mentioned indenture of lease charged upon the premises and the tenant &c., had been paid up to the said 29th day of September, and the covenants &c. therein contained had been well and duly performed: and also, that for and notwithstanding any such act, deed, matter, or thing, he the said *John Lock* had in himself full power and lawful

1. A lessee for a term of eleven years, if *C.* should so long live, by indenture reciting a demise to him for eleven years, and that he had agreed to sell the residue unexpired thereof, granted and assigned the same, and covenanted that, notwithstanding any act, deed, matter, or thing whatever, done by him at any time theretofore, the lease was, at the time of the assignment, a good, valid, and effectual lease, and that the term of eleven years was in full effect, and in nowise forfeited, surrendered, assigned, determined, or otherwise become void or voidable, or prejudicially affected, otherwise than by effluxion of time; and also that, notwithstanding any such act, matter &c., he had full power to assign &c., and also for quiet enjoyment without disturbance by him or any persons claiming under him or by his acts. Before the assignment the lease had become determined by the death of *C.*, which was known to the assignor:—*Held*, that the words "notwithstanding any act &c." done by the assignor, qualified the covenants throughout, and that he was not therefore, on eviction of the assignee by the reversioner, liable for a breach of his covenant that the term was valid and subsisting at the time of the assignment.

2. After *C.*'s death, and before the assignment, the assignor had, by payment of rent to the reversioner, created a fresh tenancy from year to year:—*Held*, that this payment being wholly inoperative quoad the term already determined, could not be considered an act in breach of the covenants.

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and absolute authority to bargain, sell, assign, transfer and assure the said messuage &c. unto the said plaintiff, his executors &c., for and during all the residue and remainder which was to come and unexpired by effluxion of time, of or in the said term of eleven years so therein granted as aforesaid, in the manner aforesaid, according to the true intent and meaning of the same indenture: and further, that he the said plaintiff &c. should or lawfully might, immediately after the execution thereof, and from time to time and at all times thereafter, during the residue and remainder which, from the 29th day of September then next, was to come and unexpired by effluxion of time of the said term of eleven years, by the said in part recited indenture of lease, peaceably and quietly enter upon and enjoy &c., for and during such residue and remainder of the said term, and receive, take and retain the rents, issues, and profits &c., without any action, eviction &c., of or by the said *John Lock*, his executors &c., or any person then or thereafter rightfully claiming or possessing any estate &c. or interest in the said premises, and in trust for him, or by or through his or their acts, deeds, defaults, means, consent, or privity: and that free and absolutely acquitted &c., by and at the expense of the said *John Lock* &c., and well and effectually protected, indemnified &c., against all former and other assignments, estates, rights, titles, trusts, interests, charges, payments, and incumbrances &c., which had been, or which at any time thereafter should or might be committed, created, or knowingly occasioned or suffered by him, or any person &c. claiming or possessing any legal or equitable estate, right, title, trust, or interest, by, from, or under or in trust for him. The declaration then stated, that on 19th January, 1829, the plaintiff bargained and sold one undivided moiety of the said messuage &c. to *Robert James* for the residue of the said terms, provided *Georgiana Scott* and *S. S. Clement* should so long live; and covenanted with him that the first-mentioned indenture of lease then was and continued a good and subsisting lease, and not surrendered, forfeited, or become void or voidable in any manner whatever, and that the plaintiff had good title to bargain and sell, and also for quiet enjoyment by *James* for the residue of the term, provided *Georgiana Scott* and *S. S. Clement* should so long live, and afterwards, 16th August, 1829, sold the other moiety with like covenants. It then averred, that before the making of the indenture between *John Lock* and the plaintiff, on 7th September, 1825, *S. S. Clement* died, whereby the lease to *John Lock* was determined as to one moiety, and that the remainder-man, after the demise to *James*, entered upon that moiety, and by process of law expelled *James* on 13th April, 1831, whereupon *James* brought an action of covenant against the plaintiff, and on 16th February, 1832, recovered damages to the amount of 950*l.*, and that the plaintiff expended 200*l.* in respect of the said action. It also averred, that before the making of the indenture between *John Lock* and the plaintiff, *John Lock* had notice of the death of *S. S. Clement*, but that the plaintiff had no notice of it until after the making of the indenture between himself and *James*.

Breach assigned, that the indenture between *Lock* and the plaintiff was not at the time of making it a good and valid lease, and that the same and the term therein were not in full effect, and in nowise forfeited, surrendered, assigned, determined, or otherwise become void, and otherwise than by effluxion of time; and that the said *Lock* had not himself full power &c., as by the said covenant in that behalf is expressed; and further, that the

plaintiff could not and did not enjoy the premises aforesaid, as in the indenture between the plaintiff and *Lock* it was covenanted that the plaintiff should enjoy, contrary to the tenor of the said indenture and the covenants, &c.

Pleas: 1st, non est factum; 2nd, that the remainder-man did not eject *James;* 3rd, that *Lock* had no notice, before making the indenture between him and the plaintiff, of the death of *S. S. Clement;* 4th, that the plaintiff has been indemnified against all former assignments, interest, &c. at any time before created by *Lock*, or any one claiming under him.

Seanah Stoe Clement died on the 7th of September, 1825, and the jury found that *Lock* had notice of her death before September, 1826. The plaintiff entered into and was possessed of the premises under the assignment of the 21st of September, 1826, and afterwards assigned to one *Robert James*, who was by due course of law evicted in Hilary term, 1831, of one moiety of and in the demised premises by one *George Scott*, having a title arising upon the death of the said *Seanah Stoe Clement*, and by reason of the death of the said *Seanah Stoe Clement*. It was proved at the trial, that the said *George Scott* received from *Lock*, in April, 1826, 50*l.* for one year's rent due to one *Hardisty* (the guardian of *Joseph Clement*, on whom *Seanah Stoe Clement's* moiety had devolved) and himself, and afterwards received of *Stannard* and *James*, up to the time of his eviction, the rent reserved by the lease of the 26th February, 1825. Assets were admitted by the defendants. The cause came on for trial at the Middlesex sittings, in Michaelmas term, 1834, when a verdict was taken for the plaintiff, subject to the opinion of the Court on the plaintiff's right to recover damages against the defendants for breach of covenant entered into by *Lock* as aforesaid.

The question for the opinion of the Court is, whether the plaintiff is entitled to recover in this action against the executors of *Lock* for breach of covenant.

Kelly (with whom was *Hayward*) for the plaintiff.—No question whatever can arise upon the three first pleas; all the facts put in issue by them have been specially found for the plaintiff. The fourth plea relates only to the covenant of indemnity against any interests or assignments created by *Lock*. It affords therefore, even if true, no answer to a breach of any of the other covenants, and the plaintiff is thus in the same condition as if he were shewing cause against a motion in arrest of judgment. As to the express covenants, the question is, whether they are qualified or absolute covenants, that the lease was a good and subsisting lease at the time of the assignment to the plaintiff.

The points to be made for the plaintiff are, 1st, that by the recital in the indenture of assignment that the lease was a good and valid lease, and by the use of the words "grant and assign," a general covenant must be implied by *Lock*, that this was a good lease for the residue of the 11 years.

2nd, Independently of such implied covenant, the second express covenant is not qualified by any other part of the indenture.

3rd, Assuming that it is a qualified covenant, there has been a breach of it.

4th, Taking all the covenants to be qualified, there has still been a breach of them.

As to the first point, the rule is, where the words "dedi concessi" occur,

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that if there are express covenants to the same effect, these merge the implied covenants. On the contrary, if the express covenants are only cumulative and not to the same effect, both may coexist, though relating to the same subject, *Co. Lit.* 384 a. The only argument that can be used here to shew that the general words, grant &c., are restrained, must be that there is a qualified covenant as to the same subject. But *Johnson* v. *Procter* (*a*) shews the contrary, and is an authority on all-fours with the present case. There *Johnson*, the lessee of one moiety of an estate, granted the whole to *Procter* by indenture, reciting that he was entitled to it by survivorship, and covenanted for quiet enjoyment, *notwithstanding any act done by him.* And it was held that *Procter*, having been afterwards evicted by the assignee of the other lessee, was entitled to recover against *Johnson*; because, as to one moiety, *Johnson* had no power to grant, and that the qualified covenant did not restrain the general one. So it is here. Had *Clement* died after the indenture, there would have been no breach, but she being dead before its execution, the covenant, as in that case, was broken when made, and *Lock* was liable upon it. This case is cited with approbation by Sir *Edward Sugden* (*b*), and Lord *Eldon*, referring to it in *Browning* v. *Wright* (*c*), observes that the recital there amounted to a warranty. In *Barton* v. *Fitzgerald* (*d*), the instrument recited an original lease for 10 years, and contained a bargain and sale of the premises for all the rest of the term of 10 years, but only "in as ample a manner as the assignor might have held the same," and there was a general covenant for title. The original lease was in fact for 10 years, determinable on a life, and that life having dropped, after the assignment, but before the effluxion of the 10 years, it was held that the assignee might assign a breach upon the general covenant for title, and that it was not restrained by the other covenants in the instrument. In *Smith* v. *Compton* (*e*), the Court said that, with one exception, there is no case where a general covenant has been held to be qualified by others, unless in some way connected with it. The exception alluded to is *Milner* v. *Horton* (*f*), the authority of which is denied by the Court. *Howell* v. *Richards* (*g*) is to the same effect. In the assignment of a lease, it is reasonable that we should expect to find more absolute covenants, than in the conveyance of a fee. This is observed by Lord *Eldon* in *Browning* v. *Wright* (*c*). The title of a leasehold estate often cannot be got at, and therefore insertion of an absolute covenant by the vendor is the more necessary.

In construing instruments of this nature it was formerly held, where there were several covenants preceded by a general introductive and qualifying clause, that such clause qualified all the covenants; but that, if the qualifying clause occurred in any other part of the instrument than in the commencement, it merely qualified those covenants which followed. A more rational rule now prevails, as laid down by Lord *Ellenborough* in *Barton* v. *Fitzgerald* (*d*) and in *Gainsford* v. *Griffiths* (*h*), and the notes to that case, that the proper construction is to bring every part of an instrument into

(*a*) Yelv. 175, *S. C.* Cro. Eliz. 809, Cro. Jac. 233; 1 Bulst. 2, and affirmed on error 2 Brownl. 212.

(*b*) Vend. & Purch. title "Construction of Covenants for Titles," where all the cases are collected and reviewed.

(*c*) 2 B. & P. 13.

(*d*) 15 East, 530.

(*e*) 3 B. & Ad. 189.

(*f*) M'Clel. 647.

(*g*) 11 East, 633.

(*h*) 1 Wms. Saund. 58

action, in order to collect one uniform and consistent sense from the whole. Now here *Lock*, by his own act of paying rent to the reversioner, had accepted a tenancy from year to year. It never can be contended that the plaintiff intended to take this limited lease, which is very different from the lease recited. If there had been a bad title, unknown to *Lock*, in one of the lessors paramount, it might have been otherwise. But the defendants cannot be permitted to say, that *Lock* did not intend to covenant against this act, which was clearly so wholly his own. The concluding words in the qualified covenant are, "except by effluxion of time." Now it would be repugnant and absurd to attempt to apply these words to any act done by *Lock*. But casting these aside, and assuming the covenant to be that on the 21st of September, 1826, the lease was a good and valid lease for 11 years, and not void or voidable by any act done by *Lock*, still there was a breach even of such covenant. *Lock* did not become a tenant from year to year by operation of law, but by his own act,—by the payment of rent. That constitutes an agreement between him and the reversioner. Supposing this to have been an actual lease for 11 years, it cannot be denied, that, if after lease he had become a tenant from year to year, that would have operated as a surrender. In a case on the Norfolk circuit, *Patteson*, J. held, that by an agreement to hold as tenant at will, a larger term was concluded.—[*Coleridge*, J.—Would the payment to a third party have that effect? You must assume *Clement* to be alive, would the payment to the reversioner then have such an effect?]—The difficulty only arises by assuming the existence of an absolute term. Here *Clement* being dead, the act done by *Lock* was certainly prejudicial to the plaintiff's title. In *Howes* v. *Brushfield* (*a*), the covenant was only against any interruption by the seller, or by, through, or with his act, means, or default, &c.; still it was held to apply to a certain quit rent due at the time of the conveyance, though possibly the rent might have accrued before he was tenant of the premises. So in *Lady Cavan* v. *Pulteney* (*b*), the lessor recited that he was seised in fee, but he covenanted only against his own acts; the lessee was evicted by a remainder-man under a settlement. Lord *Roslyn* held, that the lessor was liable on his covenant; probably on the ground suggested by Sir *E. Sugden* (*c*), that the lessor ought to have obtained the fee simple, as he might have done by suffering a recovery, and that whether he omitted to do so by fraud or negligence was immaterial, the consequence to the lessees being the same.—Here the breach is proved as regards all the covenants. *Lock* covenants against any thing done or suffered by himself. At the time he entered into that covenant he knew that he was falsely reciting the lease.

Hoggins (with whom was *Tremenheere*), *contrà*.—The question is, whether these covenants are qualified, so as to apply only to any act done by *Lock*. The rule of construction is, as laid down by Sir *E. Sugden* (*c*), that the introductory words in a deed override the whole of the covenants having the same object, and for this he cites *Browning* v. *Wright* (*d*). It is contended that in that case the instrument was not similar to the one in question; but the rule of construction is the same, whether the instrument

(*a*) 3 East, 491.
(*b*) 2 Ves. jun. 544.
(*c*) Vend. & Purch. title "Construction of Covenants for Title."
(*d*) 2 B. & P. 13.

be the conveyance of a fee or the assignment of a lease. The generality of a latter covenant in that case was held to be qualified by the restrictive words in a former covenant. Upon the authority of that case all these covenants must be held to be qualified. *Broughton* v. *Conway* (*a*) carries the principle very far. The vendor in that case covenanted that he had not done any act to disturb the vendee, but that the vendee might enjoy without disturbance of him *or any other person*. Yet it was held that the covenant was confined to acts done by the vendor, and the latter words were said to be dependent on the preceding. To the same effect is *Nind* v. *Marshall* (*b*). In *Gainsford* v. *Griffiths* (*c*) the first covenant was general, and for that reason the restriction was not held to over-ride all the other covenants. There is nothing here, either in recital or in any other part of the deed, from which it can be implied that *Lock's* intention was to covenant generally. It has been contended that even if the covenant, that the lease was valid, is a qualified covenant, still there has been a breach, and *Howes* v. *Brushfield* (*d*) was cited. But Sir *E. Sugden* (*e*) questions that case, which he seems to say conflicts with prior decisions, and he refers to Lord *Alvanley's* judgment in *Hesse* v. *Stevenson* (*f*). In *Woodhouse* v. *Jenkins* (*g*), where the covenant was against eviction by any one claiming under the lessor, or by his acts, means, consent, neglect, default, privity, or procurement, it was held that the lessor was not liable on an eviction by title paramount; and *Tindal*, C. J. distinguishes the case of *Lady Cavan* v. *Pultency* (*h*). There the lessor recited that he was seised of an estate of freehold and inheritance. The recital does not correspond with the recital in *Johnson* v. *Proctor* (*i*) and *Barton* v. *Fitzgerald* (*k*), but if it did, still the inference contended for could not be raised. Sir *E. Sugden* (*e*) lays it down in very strong terms, that the judgment of the Court in the former case did not proceed upon the recital, but on the word "grant," and cautions his readers against entertaining the proposition, that a general recital that the vendor is seised in fee amounts to a warranty, and is not controlled by covenants which are limited.

Kelly, in reply.—[*Coleridge*, J.—Supposing this to be considered as a motion in arrest of judgment, can we take into consideration the acts done by *Lock* making himself a tenant from year to year?]—Perhaps not that fact, but the declaration states that he knew of *Clement's* death. It is contended that the qualified covenant must apply to all that follow it. But these covenants are distinct and complete in themselves; every one begins "And that." Not to speak of the absurdity of construing the effluxion of time to be an act of the assignor, there is the covenant relating to the payment of rent, that also becomes insensible if the qualifying words are applied to it. But there is no argument to shew that they apply to one covenant which is not equally good to shew that they apply to all. If, therefore, the argument is not good to shew that they apply to all, it cannot avail to shew that they apply to some only. Again, if all the covenants are left without these

(*a*) Dy. 240, Mod. 58.
(*b*) 1 B. & B. 319.
(*c*) 1 Wms. Saund. 58.
(*d*) 3 East, 491.
(*e*) Vend. & Purch. title "Construction of Covenants for Title."
(*f*) 3 B. & P. 565.
(*g*) 9 Bing. 431.
(*h*) 2 Ves. jun. 544.
(*i*) Yelv. 175, *S. C.* Cro. Eliz. 809, Cro. Jac. 233, 1 Bulst. 2, and affirmed on error 2 Brownl. 212.
(*k*) 15 East, 530.

qualifying words, they are perfectly sensible and consistent. It has been said that the recital in this case does not correspond with that in *Barton* v. *Fitzgerald* (*a*). But if both recitals are read throughout it will appear that they virtually correspond.

Cur. adv. vult.

Lord DENMAN, C. J. on this day (after stating the facts of the case) proceeded as follows.—It has long been established, that where in a conveyance express covenants for warranty are introduced, none can be implied from the general words of conveyance, and that the Court has no other duty to discharge than that of correctly construing the language employed. In performing this task on any particular occasion, we are not likely to derive much assistance from the former decisions that may be cited, as every instrument varies in some respect from all others, and must be interpreted according to its own language. It should seem that the true grammatical sense of the words employed, when that can be ascertained, must prevail, and no case can be quoted in which our Courts have thought themselves at liberty to act in direct contravention of it. Such a course might indeed become necessary, for a deed may contain repugnant clauses; where these occur, the authorities fully warrant us in comparing the clause under immediate consideration with all which precedes and follows it, even though not forming parts of the same sentence, and with the nature of the obligations entered into for the purpose of discovering and effectuating the intention really expressed by the parties. But when we examine the covenant said to have been broken by *Lock*, by conveying the term after his title had determined, and find it inseparably connected with the preceding words, we do not find the least difficulty as to the grammatical meaning, and that appears, on examination, to be conformable to the general intention of the testator who entered into the covenant. All the covenants but the second are admitted to be restricted; the second is in these terms. (His lordship here read the covenant.) But the whole series of covenants is introduced by qualifying words, which (we cannot doubt) run through both clauses of the sentence. The effect is, " I covenant, that for and notwithstanding any act of mine, I have a right to convey the term, and that the term is neither forfeited, surrendered, nor in anywise impaired, except by the effluxion of time." It was acutely remarked, that these last words rendered the restriction nonsensical, as effluxion of time could have been no act of the covenantor. They are indeed unnecessary, but from that quality in legal documents too strong inferences cannot be safely drawn. On the other hand, the absurdity of guarding himself from covenanting against any acts but his own, and in the same breath covenanting that the term was not affected by the acts of any person whatever, is glaring, and is rendered still more so by his repetition of the qualifying words after the succeeding covenant, which relates to the fact of clearing up arrears &c.—a fact with which his predecessors could have no concern. The same words are carefully incorporated in the residue of his covenants. The covenants in truth form one sentence, the first clause of which is restricted by the acts of the covenantor;

(*a*) 15 East, 530.

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the second omits to repeat the restriction; but the third refers to it by the expression "for and notwithstanding any such acts, &c."

If both parties had attentively scanned the language of the deed before completing the assignment, neither could have believed the covenant to include any others than the testator and those claiming under him.

We feel it unnecessary to travel through the cases: that of *Browning* v. *Wright* (*a*) may however be referred to as fully warranting the principle on which we act, and closely resembling the present case in the form of the covenant.

A second point was attempted to be raised from an additional fact in the case, viz. that, supposing the construction above stated to be right, there was still a breach of covenant by *Lock* in paying rent to his lessor after knowledge that one of the lives had fallen. This act, it was said, would have the effect of converting his term into a tenancy from year to year, if done while the life continued, and could have no less effect after the life had dropped. But granting these premises for the sake of the argument, we think the conclusion does not follow, for the simple reason, that the payment of rent made no difference whatever in *Lock's* interest, which had previously expired. What he did was wholly inoperative, and could not therefore be a breach of his covenant.

For these reasons, we are of opinion that the plaintiff is not entitled to recover, and our judgment must be for the defendant.

Postea to the defendant.

(*a*) 2 Bos. & Pul. 13.

WRIGHT *v.* ACRES.

May 5th.

A declaration in assumpsit contained two counts, each of them alleging defendant to be indebted to the plaintiff in the sum of 10*l.* The damages were laid at 20*l.* The defendant pleaded to the whole declaration, first, non assumpsit, and secondly, payment of 10*l.* in satisfaction. Before the trial a nolle prosequi was entered as to one of the counts. Verdict for the defendant on the plea of payment: *Held*, on motion for entering judgment for the plaintiff non obstante veredicto, on the ground that payment of 10*l.* had been improperly pleaded in satisfaction of a larger sum:—

1. That the plea must be considered with reference to the state of the record at the time of the trial, at which time it was a good plea.

2. That even if imperfect, it would be cured by the verdict.

ASSUMPSIT. The declaration contained two counts; the first stating that the defendant was indebted in 10*l.* for work and labour, and the other, that he was indebted in 10*l.* on an account stated. The declaration concluded by alleging a breach of the defendant's promise to pay &c., to the plaintiff's damage of 20*l.* Pleas to the whole declaration; first, non assumpsit; and secondly, that the defendant had paid 10*l.* to the plaintiff in full satisfaction and discharge of the promises in the declaration mentioned, and of all damages sustained by the plaintiff by reason of the non-performance thereof, which sum of 10*l.* the plaintiff received in full satisfaction, &c. To the count upon the account stated, the defendant pleaded his infancy; and as to this count, the plaintiff, before the trial, entered a nolle prosequi. The cause was tried before the under-sheriff of Middlesex: verdict for the defendant on the issue as to the payment of 10*l.* in satisfaction. *Erle* had obtained a rule nisi for entering judgment for the plaintiff non obstante veredicto, on the ground that the plea of payment of 10*l.* in satisfaction could furnish no answer to a claim for 20*l.*

Cleasby now shewed cause.—This is not, as in the case of *Thomas* v. *Heathorn* (*a*), a plea of payment of a smaller sum in satisfaction of a larger; because a nolle prosequi had been entered before trial as to the 10*l.* claimed by the second count. There was at that time, therefore, nothing upon the record to shew that the sum paid was less than the sum claimed. Another most important distinction between this case and *Thomas* v. *Heathorn* is, that the present question is not raised by demurrer as in that case, but after verdict. The issue upon the plea of payment in satisfaction, necessarily required the defendant to prove that he had paid the plaintiff so as to satisfy the whole of the demand; and that issue having been found for the defendant, any imperfection in his plea, if any remain after the entry of the nolle prosequi, is cured by the verdict. The doctrine upon this point is set out in *Stennel* v. *Hogg* (*b*).

Erle, contrà.—The question is, whether this plea was sufficient at the time when it was put on the record; but the defendant's case is not mended by considering whether the plea was sufficient at a subsequent time, namely, after the entry of the nolle prosequi. Even then the plea would set up a payment of 10*l.* in satisfaction of 10*l.* in the count, without reference to the damages, which are always due in law, where a promise has been broken. The damages were laid at 20*l.*, but if this plea be good, the plaintiff could not, under any circumstances, have recovered more than 10*l.*—[*Littledale*, J.—If it had been proved that the plaintiff was entitled to 15*l.* altogether, 10*l.* of which had been paid, I do not think the state of this record would have prevented his recovering the remaining 5*l.* It would be taken that the plea, however bad in form, was intended to apply to whatever was really due.]

Per Curiam (*c*).—The record must be looked at as it stood at the time of the trial. The payment of 10*l.* was then pleaded to one count only; at all events, no exception can now be taken to this plea, on the ground that it sets up a payment of 10*l.* in satisfaction of a demand of a larger sum, for the verdict in effect necessarily finds that the plaintiff has been paid all that he was entitled to in the shape of damages or otherwise.

Rule discharged.

(*a*) 2 B. & C. 477.
(*b*) 1 Wms. Saunders, 228, n (1.)
(*c*) Lord *Denman*, C. J., *Littledale*, *Patteson*, and *Coleridge*, Js.

REX *v.* The Guardians of the ASTON UNION.

May 6th.

A quo warranto information does not lie against a person for exercising the office of guardian under the Poor Law Amendment Act.

CHILTON applied for a rule calling upon eighteen persons to shew cause why an information in the nature of a quo warranto should not be filed against them for exercising the office of guardians of the poor of the Aston Union. He stated various particulars, which are not here material, to shew that there had been an undue election of these persons to the office. *Comyns' Digest*, citing *Rex* v. *Nicholson* (*d*), Quo Warranto (A), and *Rex* v. *Boyles* (*e*), shew that the information is grantable wherever any new jurisdiction or public trust is exercised without authority. In the judgment to *Rex* v.

(*d*) 1 Str. 299.
(*e*) 2 Str. 836.

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Beedle (*a*), it is mentioned that a rule for this information was granted against a person acting as guardian of the poor in Exeter, under 28 *Geo.* 3, c. 76.—[Lord *Denman*, C. J.—The judgment in *Rex* v. *Beedle* rests entirely upon that case, which was mentioned by Mr. *Dealtry*; but the subject was afterwards fully considered in *Rex* v. *Ramsden* (*b*), and it was held that the information does not lie for the office of governor of the poor under a local act.]—This union, and the office in question, are created, not under a local act, but the new Poor Law Act, which may distinguish this case from *Rex* v. *Ramsden*.—[*Patteson*, J.—Yet a quo warranto information does not lie for the office of overseer or churchwarden (*c*), which are quite public offices.]

Per Curiam (*d*).—We cannot depart from the authority of *Rex* v. *Ramsden*.

Rule refused.

(*a*) 3 Ad. & El. 467.
(*b*) 3 Ad. & El. 466.
(*c*) See *Rex* v. *Danberry*, 1 Bott. P. L. 324, and *Rex* v. *Dawbeny*, 2 Str. 1196.
(*d*) Lord *Denman*, C. J., *Littledale* and *Patteson*, Js. *Coleridge*, J. was in the Bail Court.

REX *v.* The Inhabitants of BIGHTON.

May 6th.

The 43 *Geo.* 3, c. 110, requiring parish officers to make payment annually of not less than one-twentieth part of monies borrowed under 22 *Geo.* 3, c. 83, (*Gilbert's* Act), does not bar the claim of any creditor neglecting to obtain such part payment.

Where, therefore, a creditor had lent money under the last-mentioned act thirty years since, without having received back any part of the principal, the Court directed a mandamus to the parish officers to repay the principal with all interest due thereon.

SIR *F. POLLOCK* had obtained a rule calling upon the parish officers of the parish of Bighton to shew cause why a mandamus should not be directed to them to make a rate for payment of the principal and interest due upon two bonds of 50*l.* each, given to one *John Jacob*, since deceased, to secure money lent by him to the guardians of the parish under 22 *Geo.* 3, c. 83. (*Gilbert's* Act.)

It appeared from an affidavit of the executor of *Jacob*, that the money was lent in 1806 to the parish officers, who paid the interest until *Jacob's* death, which occurred a year or two since; and that they had recently refused to repay the money, on the ground that, as it had not been paid off within twenty years from the time of the loan, it could not now be allowed in the parish accounts.

Sir *J. Campbell*, A. G. now shewed cause. The parish has now no power to pay off the debt, more than twenty years having elapsed since it was contracted. Section 20 of *Gilbert's* Act empowers the parochial authorities, for the purpose of building poor-houses, to borrow money, which is to be charged on the rates, but is not required to be paid off within any limited period. It was, however, enacted, that in case any money should be borrowed under the powers of the said act for the building of any poor-house, that the assessments for the relief of the poor should continue at the same rate they were when such poor-house was first established, until the debt so contracted and the interest thereon should be fully discharged. This provision having been found burdensome and oppressive to parishes, 42 *Geo.* 3, c. 74 enabled the guardians of the poor, with the consent of the lenders, yearly to pay off any part of the sum borrowed, not being less than one-twentieth part thereof. This provision was permissive only. Doubts having been entertained whether this latter act effectually relieved such parishes as had

adopted the 20th section of 22 *Geo.* 3, another act was passed, the 43 *Geo.* 3, c. 110, which repealed so much of the section just mentioned as respected the continuation of the assessments at the same rate. It also enacted, that such assessments should from time to time be diminished to such amount as should be deemed proper and necessary: "provided always, that the guardians of the poor for the time being of every such parish, shall yearly and every year pay off or provide for a twentieth part at least of any monies which shall have been borrowed," &c. This act is compulsory upon the guardians every year to pay off one-twentieth of the sum borrowed. In this instance, it is sought to charge the rate-payers of the present day with a liability for a sum of money borrowed more than thirty years ago. The application is inequitable on the face of it, and repugnant to the express provisions of 43 *Geo.* 3.

Sir *F. Pollock*, contrà.—There is no clause in any of these acts, which says that the lender shall forfeit his money, unless he apply within a certain time for its repayment. Such a penalty is not to be imposed upon a creditor, unless the legislature has by express words deprived him of all remedy. Can it be intended that a creditor is to lose one-twentieth of his money, unless year by year he enforce the payment of each succeeding twentieth in the very year when it becomes due. No process would enable him to do so. If he applied for a mandamus, and the rule should get into the peremptory paper, the year, and with it his only opportunity, according to the argument on the other side, would necessarily elapse.

Lord DENMAN, C. J.—This is, in truth, an application under the 20th section of 22 *Geo.* 3, c. 83, which empowers the guardians of any parish, adopting the provisions of that act, to borrow money at interest for the purpose of building a poor-house, and to secure such money by a charge upon the poor rates, according to a form given by schedule xi. The same section requires the guardians duly to pay and keep down the interest of any sums so borrowed, and that the poor's assessments shall continue at the same rate they were when such poor-house was first established, until the debt so contracted and the interest thereof shall be fully discharged. The 43 *Geo.* 3, c. 110, then repeals so much of the above act as relates to the continuance of these assessments at the same rate; and after enacting, that from time to time they may be diminished as may be thought necessary, adds a proviso, "that the guardians of the poor for the time being of every such parish, shall yearly and every year pay off or provide for a twentieth part at least of any monies which shall have been borrowed for the purpose aforesaid." It is contended that, under this proviso, the debt in this case is extinguished, because a particular mode for its repayment has been pointed out by the statute, of which the creditor has neglected to avail himself, and that he is now by his own laches left without any remedy. On full consideration I think that the statute has no such effect, and that the proviso relied upon cannot be so construed as to relieve the rates of the parish from an incumbrance, with which they have been expressly charged by a prior act of parliament. The creditor would have acted wisely if he had from time to time taken care to receive the interest due to him, together with the proportional part of

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The Inhabitants of Bourton.

his principal; but, it appears to me, the legislature did not, by the subsequent act, intend to extinguish his claim, or it would have used direct terms to express its intention.

There may, however, be some objection to this rule in its present shape; because it would be unjust to the present rate-payers to compel them at once to pay off a debt, which the statute creating the charge has said shall be paid off gradually and in small proportions. But the charge still continues, and the section creating it enables the guardians, when called upon, to repay any creditor by borrowing again from some other person. I think they ought to pay the principal and interest in this case; and this rule, therefore, will be made absolute, not in its terms, but commanding them generally to make the payment, and leaving it to them to decide upon the most convenient method of making it.

Littledale, J.—The 43 *Geo.* 3, does not throw any obligation upon the creditors to require part payment of their claim from year to year, but upon the guardians to make such payment. I think this mandamus should issue to the parish officers to discharge this claim, although they do not seem to have any power to make a rate for the purpose of discharging it.

Patteson, J.—It is difficult to ascertain the meaning of these various acts; but I think it clear that no part of the 20th section of *Gilbert's* Act has been repealed, except that part of it respecting the continuance of the assessments at one uniform rate, and that part has been repealed by express words. The schedule to 22 *Geo.* 3, which has been referred to, giving the form of security for money borrowed, does not specify any time of payment. It seems then the creditor might call in his money whenever he pleased, and the guardians borrow again of another person, and assign over to him the original security. The 42 *Geo.* 3, c. 74, empowering the guardians, with consent of the creditors, to pay off yearly one-twentieth of the monies borrowed, does not appear to mean that every year there shall be discharged one-twentieth of each particular loan; for it says, "in case such sum to be paid off, shall not in any one year be sufficient to discharge any one of the notes, the money shall remain in the hands of the overseer until it amounts to a sufficient sum to discharge any of the said notes." This provision indicates, not that all creditors are to be paid rateably from time to time, but rather, that one creditor is to be paid in full; and appears itself to contemplate that delays may sometimes occur in the course of liquidation prescribed. The proviso in the 43 *Geo.* 3, c. 110, also directs the annual payment, not of one-twentieth of each particular loan, but of the aggregate monies borrowed. I do not, therefore, see that the creditor in this instance has been guilty of any default; and it would be very hard upon him that his claim should be extinguished.

Rule absolute for a mandamus to pay principal and interest.

Doe, on the several demises of Chawner, H. P. Beavan, and another, *v.* Boulter.

King's Bench.

May 1st & 2d.

A. granted two several rent-charges to the lessors of the plaintiff, with powers of distress and entry in default of payment, and then made a lease for years to the defendant. The grantee of the second rent-charge, which was in arrear, recovered in ejectment against the defendant, who thereupon attorned tenant to him. Afterwards, the grantee of the first rent-charge also making a claim for arrears, *A.* and the two grantees referred the matter to an arbitrator, who made his award that the arrears due to the first grantee should be first satisfied. This award having been served upon the defendant, he declared in writing, "that he had attorned to and become the tenant" of the first grantee, to whom also he paid rent.:—*Held*, that a tenancy from year to year was created between them, and that the right of the defendant under his lease was suspended until the payment of such arrears.

EJECTMENT for lands in Radnorshire. At the trial before *Patteson*, J., at the Radnorshire Summer Assizes, 1835, the case was opened as a case of landlord and tenant between *H. P. Beavan* and the defendant; and was supported by the production of the following instrument:—

"12th April, 1826.

"*Memorandum.*—That I have this day attorned to and become tenant of Mr. *Hugh Phillips Beavan*, of &c., for a farm &c., now in my occupation; and in acknowledgment of such attornment have this day paid to Mr. *R. P.*, the authorised agent of the said *H. P. Beavan*, the sum of 1*l.*, on account of the arrears of rent due to the said *H. P. Beavan*.

"*Henry Boulter.*"

It was also proved that rent had been subsequently paid from time to time to *H. P. Beavan*; that he had also more than once put in distresses for rent; and that he had ultimately determined the tenancy by a regular notice to quit.

In answer to this case, it was proved that one *Theophilus Beavan* was tenant for life of the premises in question; that he had in 1811 granted a lease of them to the defendant for sixty years, if he, *Theophilus Beavan*, should so long live; and it was contended that the defendant had attorned to *H. P. Beavan*, not as landlord but as reversioner.

The plaintiff then proved in reply, that in 1785, *Theophilus Beavan* by his marriage settlement, charged the said premises with a rent-charge of 80*l.*, payable yearly to the trustees of his settlement, of whom the said *H. P. Beavan* had become the representative, *with the usual powers of distress and entry*. That in 1795, *Theophilus Beavan* granted a second rent-charge to *Chawner*, one of the lessors of the plaintiff, by means of a demise and re-demise, *Theophilus* demising to *Chawner* at a pepper-corn rent, for ninety-nine years if he, *Theophilus*, should so long live; and *Chawner* re-demising to *Theophilus* at the rent of 55*l.* a year. The re-demise from *Chawner* reserved to him a power, if the rent should be in arrear, to enter into and upon, and to have, hold, use, occupy, possess and enjoy the said premises &c., and to have, receive, and take the rents, issues, and profits of the same, until he should be fully paid and satisfied so much of the said rent as should be then in arrear. This second rent-charge being in arrear, *Chawner*, in 1823, brought ejectment and obtained judgment against *T. Beavan*, and was about to execute a writ of possession, when the defendant, after some objection, on the ground that *H. P. Beavan* was a prior incumbrancer on the premises, attorned to *Chawner*, and afterwards paid to him the rent reserved by the lease of 1811, instead of to *T. Beavan*. To explain the subsequent attornment in 1826, to *H. P. Beavan*, an award made, upon a reference, to which *H. P. Beavan*, *T. Beavan*, and *Chawner* were parties, was put in evidence, dated August, 1825. This award, after reciting, among other things, that considerable arrears were owing both to *H. P. Beavan* and to *Chawner* upon their several rent-charges, that *H. P. Beavan* had made a distress for arrears of his rent-charge, and that *Chawner* had thereupon brought an action of replevin, which, with all other matters in difference, it had been agreed to refer to the

decision of the arbitrator, declared that the rents should in future be paid by the defendant, first, in satisfaction of the arrears owing to *H. P. Beavan*, and then in satisfaction of the arrears owing to *Chawner*. A copy of this award was served upon the defendant, who thereupon made the before-mentioned attornment to *H. P. Beavan*.

Upon these facts the learned judge was of opinion, that the clause of re-entry in the lease to *T. Beavan* was to be construed reddendo singula singulis, so that, if the land were in possession of *T. Beavan* himself when the arrears became due, then *Chawner* might bring ejectment, and hold and enjoy the land; but that if it were in the possession of any under-tenant, or other person paying rent, that then *Chawner* could not turn such person out of possession, but merely require the rent to be paid to him instead of to *T. Beavan*; and that, even if any tenancy had been created between the defendant and *Chawner*, this action could not be sustained, as no notice to quit had been given. The learned judge was also of opinion, that the attornment to *H. P. Beavan* did not create any relation of landlord and tenant, but was simply an agreement by the defendant to pay the rent to him instead of to *T. Beavan*. His lordship, therefore, directed a nonsuit, giving leave to move to enter a verdict for the plaintiff.

Chilton accordingly, in Michaelmas term, 1835, obtained a rule nisi, on the ground that the demise by *Chawner* to *T. Beavan* was determined, or at least suspended, upon *Chawner*'s entry for the arrears of rent-charge, and that the defendant therefore, the under-tenant of *T. Beavan*, had no interest in the premises as long as such arrears were unsatisfied; and, secondly, that the defendant could not, after the attornment, be allowed to dispute *H. P. Beavan*'s title.

J. Evans and *W. M. James* now shewed cause.—This action cannot be sustained on either of the demises laid in the declaration. First, as to the demise by *Chawner*, the case for the plaintiff cannot be put more strongly than if, on recovering judgment in ejectment, *Chawner* had executed a writ of possession, and turned out the defendant. Had this been done *Chawner* would have retained an interest in the premises until the arrears due to him had been discharged, but no longer. After the arrears had been discharged, the defendant's interest would have revived; *Litt.* sect. 327. *Chawner*, however, divested himself of all the rights given him by the judgment in ejectment, for he was a party to that reference, under which an award was made that his claim should be postponed to that of *H. P. Beavan*. Again, if the attornment to *Chawner* created any tenancy, it has not been determined by any notice to quit.

With regard to the attornment by the defendant in 1826, to *H. P. Beavan*, it clearly had not the effect of creating any tenancy between them. An attornment never creates tenancy, it is merely an acknowledgment of a tenancy previously subsisting; *Litt.* sect. 551.—[Lord *Denman*, C. J.—The effect of an attornment is well explained by *Holroyd*, J. in *Cornish* v. *Scarrell* (*a*).]—The only meaning of the attornment in 1826, was, that the defendant merely agreed to obey the directions of the arbitrator, and to pay his rent in the first instance in satisfaction of the arrears due to *H. P. Beavan*.

(*a*) 8 B. & C. 476.

The award constituted *H. P. Beavan* a receiver, and the defendant intended to recognise him in that character, but not to acknowledge him as landlord.

Sir *W. Follett*, *Chilton*, and *E. V. Williams*, contrà.—The passage already cited from *Littleton* shews that *Chawner* had the right to enter upon and hold the land until the arrears of his rent-charge were paid. He did, in fact, recover judgment in his action of ejectment; but, instead of turning the defendant out of possession, an agreement is entered into, which, although not an attornment, established between the parties the relation of landlord and tenant. It is said that, even admitting a tenancy from year to year to have been so established, this ejectment cannot be maintained, because the tenancy has not been determined by any notice to quit. But no such notice could be necessary. For if *Chawner* gave his assent to the subsequent attornment to another person in 1826, such assent of itself determined the tenancy; and if he did not so give his assent, then the second attornment was a disclaimer of his title by the defendant, in which case notice need not be given; *Throgmorton* v. *Whelpdale* (*a*), *Doe* v. *Whittick* (*b*), *Doe* d. *Mee* v. *Litherland* (*c*), and *Partington* v. *Woodcock* (*d*).

H. P. Beavan again had the same right, and indeed a right paramount to that of *Chawner*, to enter for his arrears.—[*Coleridge*, J.—It does not appear what sort of right *H. P. Beavan* had. The award recites that he had the usual powers of distress and entry. What are they?]—*Havergill* v. *Hare* (*e*) and *Jemott* v. *Cowley* (*f*) shew that such powers enable the grantee to bring ejectment. *H. P. Beavan* then being about to exercise these powers, arbitration is had recourse to, and an award is afterwards served on the defendant. The service of this award upon the defendant disclosed to him all the facts recited in it. No misrepresentation was made to him, nor was any question of fraud left to the jury. Under these circumstances, he signs the memorandum of the so called attornment. By so doing he agreed, in consideration of *H. P. Beavan* forbearing to press his rights as grantee, to acknowledge him as landlord. The defendant thereby much improved his own situation; for it was no longer in the power of *H. P. Beavan* to turn him out of possession without the notice due to a tenant, nor to distrain, except for so much rent as might become due under the tenancy; whereas, as grantee of the rent-charge he might have swept away every thing until the rent-charge was satisfied; *Com. Dig.* Distress (B 2.) The sum of all the transactions is this:—*Chawner* by his ejectment puts an end to (at least for a time) the lease to the defendant, and a tenancy from year to year commences between them. The lease could not be set up against *Chawner*. Then by agreement between all the parties, *H. P. Beavan* is put in the place of *Chawner*. The lease, therefore, cannot be set up against *H. P. Beavan*, who has formally been acknowledged by the defendant as landlord, and repeatedly both received rent in that character, and distrained for the rent unpaid, without any replevy having been sued out.

Lord DENMAN, C. J.—The question in this case is, whether the defendant became tenant from year to year to either *Chawner* or *H. P. Beavan*. With-

(*a*) Bull. N. P. 96.
(*b*) Gow. 195.
(*c*) 6 N. & M. 313.
(*d*) 5 N. & M. 672.
(*e*) Cro. Jac. 510.
(*f*) 1 Saund. 112 b.

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out entering into the history of the deeds, these facts are clear. *Chaunce* having a charge upon the premises which are sought to be recovered by this action, recovered them by ejectment in 1823. No writ of possession was executed, but the defendant, who at this time appears to have known that *H. P. Beavan* was a prior incumbrancer, agrees to pay rent to *Chaunce* instead of to *T. Beavan*. In 1825 some differences had arisen, which *T. Beavan* and the two incumbrancers agree to submit to arbitration. An award is made establishing the paramount claim of *H. P. Beavan* as trustee of the settlement of 1785, and directing the defendant to pay rent in future to *H. P. Beavan*. This award is served upon the defendant, and he, in April, 1826, signs the memorandum called an attornment, by which he acknowledges himself tenant to *H. P. Beavan*, and that he has paid him a certain sum of money by way of rent. Upon these facts I think it impossible to deny that the defendant became tenant to *H. P. Beavan*, upon such terms as were most consonant to the situation of the parties and the directions of the award. Now the award declared that *H. P. Beavan* had a right to enter and distrain for the purpose of recovering the arrears of rent-charge due to him as trustee. The tenancy, therefore, that would seem most naturally to result, is a tenancy from year to year, so long as these arrears were unpaid. That tenancy was determined by a regular notice to quit. The only mode, by which I can conceive the obvious conclusion from all the facts of this case to be got rid of, is by shewing that some fraud has been practised upon the defendant, or that he has laboured under some misconception. I do not myself see a vestige of any thing of the sort, but if the defendant meant to rely on any such defence, he should have desired it to be left to the jury. All we have now to do is to give to the defendant's agreement its proper legal effect. I am clearly of opinion, under all the circumstances of the case, that the verdict must be entered for the plaintiff; and my learned brother says he should not have directed a nonsuit, had he not entertained upon a point of law an opinion, which, upon further reflection, he considers to be erroneous.

LITTLEDALE, J.—It is very difficult to explain away an acknowledgment made by one person that another is his landlord. I do not think the defendant ought to be concluded by the technical meaning of the words "attornment" and "becoming tenant." But I think the same operation should be given to the memorandum as if it had recited the grants of rent-charge, the award, and all the other circumstances which had taken place in relation to this property. It appears then by the deed of 1785, a rent-charge was granted to the trustees of *T. Beavan's* marriage settlement, and that the defendant afterwards obtained possession of the land, under a lease from him for 60 years. But nothing had been done since 1785 to defeat the paramount right of *H. P. Beavan* as trustee. He had a right to distrain on the defendant until the arrears of the rent-charge were paid, without giving notice to him or to any one else. An arrangement, however, was come to, by which *H. P. Beavan*, who had not, strictly speaking, any right to the land, but merely a power to enter and receive the rents, assumes the power of granting a lease, and the defendant agrees to become his tenant. Thus then a tenancy was created. It was not properly a tenancy from year to year, because as soon as the arrears are paid the defendant will have a right

to possess the land as of his former estate; but it is the same thing for the present purpose, because he has acknowledged *H. P. Beavan* as his landlord, and was liable to be turned out on notice to quit.

Patteson, J.—I was mistaken in point of law when I directed a nonsuit, on the ground that *Chawner* could not in 1823 maintain ejectment against the present defendant. I thought the proviso of entry in the demise from *Chawner* to *T. Beavan* in 1795, would enable *Chawner* to enter upon the land and turn *T. Beavan* out, if it continued in his possession, or in case it were in possession of an under-tenant, to put himself in receipt of the rents, but not to turn out such under-tenant. I was wrong in my opinion. The case of *Doe* d. *Biass* v. *Horsley* (*a*) shews that a grantee has, under such a clause, a right to possession of the land, and that it is immaterial whether the party dispossessed by him is the grantor of the rent-charge or not. The question then is, whether the nonsuit can be supported on any other ground. It seems to me that the recovery in ejectment by *Chawner* is a legal recovery, and that the effect of defendant subsequently attorning, as it has been called, and paying rent to him, was to create a tenancy of some kind. If that be so, it is clear, after the yearly payment of rent, that the tenancy could be no other than a tenancy from year to year, to continue so long as *Chawner's* interest in the land continued; that is, until payment of his arrears, after which the right of the defendant under his lease of 60 years would revive. Then there is an award served upon the defendant, by which he is directed to pay the rent in future to *H. P. Beavan*, as the prior incumbrancer. At this time he was tenant from year to year to *Chawner;* and upon service of the award, he enters into an agreement, by which *H. P. Beavan* is substituted as his landlord in the room of *Chawner*. I still think that no jury would find that the defendant intended to give up all his interest under the lease for 60 years, and to become a mere tenant from year to year. I have little doubt that, after signing the memorandum, he believed he was still paying rent under his lease, although to a different landlord. But this misapprehension does not affect the question, because he could only become tenant either to *Chawner* or to *H. P. Beavan* in such way as the law would allow, having regard to their interest in the land. Their interest could continue only so long as their arrears were unpaid, and was such an interest as would not allow him to become more than tenant from year to year.

Coleridge, J. (after recapitulating the facts of the case.)—For some time I had considerable doubts as to the propriety of granting this rule; nor are my doubts upon the demise by *Chawner* removed, for he has given no notice to quit. But I do not think it necessary to consider the argument with respect to this point, because I am clearly of opinion that the effect of the memorandum given by the defendant to *Chawner*, and the subsequent payments of rent, was to create a tenancy from year to year. Perhaps the defendant considered himself notwithstanding in possession under the lease of 60 years; but if the legal effect of the transaction, as disclosed by documents or otherwise, is that the lease was suspended, the defendant's misconception is quite immaterial. In the absence of all evidence of fraud, this is a naked question of landlord and tenant.

Rule absolute.

(*a*) 1 Ad. & El. 766.

GRAVES *v.* BROWNING.

An affidavit of debt, which describes the deponent as "*acting*" as managing clerk to the plaintiff's attorney, is bad.

R. V. RICHARDS obtained a rule nisi for discharging the defendant out of custody, on entering a common appearance, on the ground that the affidavit of debt on which he was arrested was defective. The deponent was described in the affidavit as "*George William Stone*, acting as managing clerk to Messrs. *Barrett*, *Turvill*, and *Eyston*, of Gray's Inn, in the county of Middlesex, attornies for the Honorable *Caroline Graves*, &c."

Sir *W. W. Follett*, and *Wightman*, shewed cause.—The objections to the affidavit are, that it does not sufficiently state either the deponent's place of abode, according to the rules of M. T. *Car.* 2, and H. T. 2 *Will.* 4, rule 5, or his connection with the plaintiff. *Haslope* v. *Thorne* (*a*), *Alexander* v. *Milton* (*b*), and *Anon.* 1 Chitty, 464, shew that an affidavit by an attorney's clerk, referring to the office of his employer, where he is usually to be found in the course of the day, gives his address within the meaning of the rules; and the deponent in this case manifests his connection with the plaintiff by describing himself as managing clerk to the plaintiff's attorney. But a third person may make an affidavit that the defendant is indebted to the plaintiff, without shewing that he is the agent of or connected with the plaintiff; *King* v. *Turner* (*c*).

R. V. Richards, contrà.—The defendant does not rely upon the first objection, but upon the second. Many cases have decided that an affidavit of debt may be made by a deponent describing himself as managing clerk to the plaintiff's attorney; but a person "acting" as managing clerk may be so acting during the absence for a few moments of the real managing clerk.

Per Curiam.—The affidavit is not in the usual form, and, for the reason just given, is certainly too loose.

Rule absolute.

(*a*) 1 M. & S. 103.
(*b*) 1 Dowl. P. C. 570.
(*c*) 1 Chit. 58.

HITCHCOCK *v.* COKER.

For the Report of this case, which was decided in the Exchequer Chamber in Error, last Hilary vacation, see 2 Har. & Wol. 464.

MEMORANDA.

On the 24th of February, *Thomas Coltman*, Esq., one of His Majesty's counsel, was called to the degree of the coif, and gave rings with the following motto,—"Jus suum cuique." On the same day he was appointed one of the Judges of the Court of Common Pleas, (in the room of Mr. Justice *Gaselee*, who had resigned,) and shortly afterwards His Majesty conferred upon him the honour of knighthood.

On the same day the following gentlemen were appointed His Majesty's counsel learned in the law:—

Francis Newman Rogers, of the Inner Temple, Esq.; *Biggs Andrews*, of the Middle Temple, Esq.; *George Chilton* and *John Evans*, of the Inner Temple, Esqrs.; and *Richard Budden Crowder*, of Lincoln's-Inn, Esq.

On the 9th of March, *Francis Whitmarsh*, of Gray's-Inn, Esq. and *Charles Purton Cooper*, of Lincoln's Inn, Esq. were also appointed His Majesty's counsel learned in the law.

On the 2nd of March, *John Jervis*, of the Middle Temple, Esq., received a patent of precedence, to take rank before *Francis Whitmarsh*, of Gray's-Inn, Esq., and *Charles Purton Cooper*, of Lincoln's-Inn, Esq.

Rule of the Courts of King's Bench, Common Pleas, and Exchequer, appointing Examiners.

IT IS ORDERED, that the several Masters and Prothonotaries for the time being of the Courts of King's Bench, Common Pleas, and Exchequer respectively, together with *William Tooke*, *Thomas Adlington*, *Samuel Amory*, *Benjamin Austen*, *Michael Clayton*, *Edward Foss*, *Richard Harrison*, *Philip Martineau*, *Thomas Metcalf*, *Charles Ranken*, *Charles Shadwell*, and *John Teesdale*, Gentlemen, Attornies, be, and the same are hereby appointed Examiners for one year now next ensuing, to examine all such persons as shall desire to be admitted Attornies of all or either of the said Courts; and that any five of the said Examiners, one of them being one of the said Masters or Prothonotaries, shall be competent to conduct the said examination in pursuance of and subject to the provisions of the Rule of all the said Courts made in this behalf in Hilary Term, 1836.

(*Signed by the fifteen Judges.*)

END OF EASTER TERM, 1837.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF KING'S BENCH,

AND ON WRITS OF ERROR FROM THAT COURT TO THE

EXCHEQUER CHAMBER,

AND IN THE

BAIL COURT,

IN TRINITY TERM, SEVENTH WILL. IV. 1837.

REGULÆ GENERALES.

King's Bench.

IT IS ORDERED,—That from and after the last day of this Term, all the Offices (the Rule Office excepted) be open in Term time, from eleven in the forenoon till five in the afternoon, and not in the evening. And that the Rule Office be open in Term time, from eleven in the forenoon till three in the afternoon, and from six till eight in the evening. And that all the Offices be open in vacation, from eleven in the forenoon till three in the afternoon, except between the 10th day of August and the 24th day of October, when they shall be open from eleven in the forenoon till two in the afternoon only.

(*Signed by the five Judges of this Court.*)

June 7th, 1837.

WHEREAS, by the practice of this Court, Sheriffs may now be required to file writs with their returns as well in vacation as in Term time, and upon all writs filed in vacation an extra charge of 5*s.* 10*d.* is paid for keys of the Treasury: And whereas the like charge of 5*s.* 10*d.* is also paid upon all copies of such writs or returns thereto:

It is ordered,—That from and after the last day of this present Term, such extra charge of 5*s.* 10*d.* be discontinued upon all writs filed by Sheriffs in vacation, and all searches for such writs, and all copies thereof, or of returns thereto; and that hereafter, in vacation, such writs may be filed by Sheriffs, and searches made for the same, and copies of such writs or returns thereto made and obtained, without payment of the said extra charge of 5*s.* 10*d.*

By the Court.

TOPHAM *v.* KIDMORE.

If a plaintiff takes out of Court a sum paid in by the defendant in satisfaction of his demand, he is not at liberty to pass over without replying to other pleas, rendered necessary by a larger claim made by his particulars of demand, and therefore the costs must be taxed as if a nolle prosequi had been entered as to those pleas.

THIS was an action of assumpsit for goods sold, work and labour, money lent, &c. The particulars of demand claimed the sum of 240*l.* 18*s.* 7*d.* The pleas were, first, as to all the declaration, except 65*l.* 1*s.* 6*d.*, parcel of the several sums of money mentioned in the declaration, non-assumpsit; second, as to 270*l.* 18*s.* 2*d.*, parcel &c., payment of that sum before action brought; third, as to 18*l.*, parcel of the 65*l.* 1*s.* 6*d.* in the first plea mentioned, and the causes of action mentioned, so far as relates to the said sum of 18*l.*, payment into Court, and that the plaintiff had not sustained damage to a greater amount in respect of the causes of action mentioned, so far as relates to the said sum of 18*l.*, parcel &c. (*a*); and fourth, as to all the declaration, except the 18*l.* mentioned in the third plea, a set-off. The replication was, "and the plaintiff, as to the plea of the defendant by him thirdly pleaded to the causes of action in the declaration mentioned, so far as relates to the said sum of 18*l.*, parcel of the monies in the declaration mentioned, the plaintiff freely accepts and takes the same out of Court here, in full satisfaction and discharge of the causes of action in the said declaration mentioned; therefore, as to those causes of action, the plaintiff saith that he is satisfied; and because the said defendant hath confessed the said causes of action, the plaintiff prays judgment for his costs and charges by him about his suit in that behalf expended to be adjudged to him, &c." The plaintiff made no other reply to the first, second, and last pleas, but gave notice of taxation of costs under the 19th rule H. T. *Will.* 4 (*b*). It was objected, that he ought to reply to the other pleas, and the Master accordingly, not liking to take upon himself to decide how he was to tax the costs, postponed the taxation. A rule was therefore obtained, calling on the plaintiff to shew cause why he should not reply to the first, second, and last pleas; or why, in default thereof, the defendant should not be at liberty to sign a partial judgment of non-pros, limited to so much of the causes of action as is not covered by the third plea; or why the plaintiff should not enter a nolle prosequi as to those pleas.

R. V. Richards shewed cause.—This case is already decided by the case of *Coates* v. *Stevens* (*c*), and the only difference is, that in that case the defendant acted for himself, while here he applies for leave. There it was held that the defendant could not sign judgment of non-pros for want of a replication to pleas similar to those pleaded in this case. The case of *Sharman* v. *Stevenson* (*d*) also bears in some degree on this case.

N. R. Clarke, contrà.—Both the cases cited are authorities in favour of the present rule. *Parke* B., in the case of *Coates* v. *Stevens*, mentions the method in which those pleas ought to have been pleaded, and that method has been observed in the present case. The case of *Goody* v. *Goldsmith* (*e*)

(*a*) See the rule of Court H. T. 4 *Will.* 4, 17; 2 Dowl. P. C. 320.
(*b*) 2 Dowl. P. C. 521.
(*c*) 3 Dowl. P.C. 784; 1 Gale, 75; 2 Cr. Mee. & Ros. 118.
(*d*) 1 Gale, 74; 3 Dowl. P. C. 709; 2 Cr. Mee. & Ros. 75; 5 Tyr. 564.
(*e*) 2 Gale, 194; 2 Mee. & Wels. 202; 5 Dowl. P.C. 288.

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is also a direct authority in favour of this rule being made absolute, it being a precisely similar case. The claim made by the plaintiff is for 240*l.* 18*s.* 7*d.*, and the defendant was obliged to put these pleas on the record to answer that claim, as he could not rely on the payment of the 18*l.* into Court alone. Yet the plaintiff after all admits he is entitled to 18*l.* only, and he is therefore bound to pay the costs as if a nolle prosequi were entered to the first, second, and last pleas.

Cur. adv. vult.

WILLIAMS, J. afterwards (May 8th) gave judgment. This was an application respecting costs, and the rule called on the plaintiff to shew cause why he should not reply to the first, second, and last pleas of the defendant; and if not, why the defendant should not be at liberty to enter a partial judgment of non-pros; or why the plaintiff should not enter a nolle prosequi as to the first, second, and last pleas. The declaration was in assumpsit for goods sold and delivered, work and labour, and the money counts. The particulars of demand claimed 240*l.* The pleas were, first, as to all the declaration, except the sum of 65*l.* 1*s.* 6*d.*, non assumpsit; secondly, as to the sum of 270*l.* 18*s.* 2*d.*, payment before action brought; thirdly, as to the sum of 18*l.*, parcel of the sum of 65*l.* 1*s.* 6*d.* in the first plea mentioned, payment into Court; and fourthly, as to all except the 18*l.*, a set-off for money paid and on an account stated. The plaintiff then took the 18*l.* out of Court, and took no notice of the first, second, and last pleas, and the question was, whether that course was open to him. It is right to observe, that these pleas were pleaded in the manner noticed, if not recommended by the Court of Exchequer in the case of *Coates* v. *Stevens*, and the question, as I have already stated, is, if it is open to the plaintiff to adopt this course of taking the money out of Court without taking any notice of the other pleas. It is necessary to observe the consequence of what the defendant has pleaded, and of the claim made by the plaintiff. The first plea leaves the sum of 65*l.* 1*s.* 6*d.* unanswered, the second only answers a portion of the demand, and the third pays into Court a less sum than that not covered by the first plea. Now, therefore, it is clear that from the demand of the plaintiff to the extent he made, the defendant could not have relied on the payment into Court, as that was not a satisfaction for 65*l.* 1*s.* 6*d.* The plaintiff, therefore, by the amount of his demand, made it indispensible for the defendant to do more than pay the sum of 18*l.* into Court. Hence, the first, second, and last pleas were all introduced from the necessity of the case, from the plaintiff's demand being more than the defendant thought right to pay into Court. On this single ground, therefore, the plaintiff is not at liberty to pass over all those pleas without taking any notice of them. A rule must be made, that if the plaintiff will consent, the Master shall tax the costs as if a nolle prosequi had been entered to the first, second, and last pleas; or else that he should be at liberty to amend his replication on payment of costs; if he will not consent, then that the defendant may sign judgment of non-pros for want of a sufficient replication (*a*).

Rule accordingly (*b*).

(*a*) See *Green* v. *Marsh*, the next case.

(*b*) This case was decided in the previous Easter term.

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In debt for goods sold &c., the defendant pleaded as to 10*l.* 3*s.* a set-off, but only proved 8*l.* 3*s*: as to 8*l.* 3*s.* 6*d.* he pleaded a plea which he proved: and as to the residue, he paid a sum into Court, which was taken out by the defendant. There was no plea of nunquam indebitatus:—*Held*, that the plaintiff was entitled to a verdict and judgment for the 2*l.* unproved on the first plea, although the 8*l.* 3*s.* proved, together with the 8*l.* 3*s.* 6*d.* and the sum paid into Court, amounted to the sum claimed by the particulars of demand.

THIS was an action of debt, claiming 12*l.* 12*s.* for goods sold, 12*l.* 12*s.* for work done and materials &c., and 12*l.* 12*s.* money due on an acconnt stated, the whole sum demanded being therefore 37*l.* 16*s.* The defendant pleaded, first, as to 10*l.* 3*s.*, parcel of the said supposed debt in the declaration mentioned, a set-off for goods sold &c.; secondly, as to 8*l.* 3*s.* 6*d.*, parcel of the said debts and sums of money in the said declaration firstly and secondly above mentioned, that that amount was for goods and for work and labour in making some clothes for the defendant, which the plaintiff undertook to make with due skill and in a workmanlike manner, but which he did not do, and that the defendant returned the said clothes; thirdly, "and as to the residue of the said supposed debt in the said declaration mentioned, the defendant saith, that the plaintiff ought not further to maintain his action, because the defendant now brings into Court the sum of 4*l.* 8*s.* 6*d.* ready to be paid to the plaintiff; and the defendant further saith, that he is not indebted to the plaintiff to a greater amount than the said sum of 4*l.* 8*s.* 6*d.*, in respect of the causes of action in the said declaration mentioned, and this he is ready to verify &c." (*a*). The defendant did not plead generally to the declaration, that he was never indebted. The plaintiff replied to the set-off, that he never was indebted; he traversed the return of the clothes stated in the second plea; and "the plaintiff, as to the plea of the defendant by him lastly pleaded to the residue of the declaration in the said last plea mentioned, says that he accepts the said sum of 4*l.* 8*s.* 6*d.*, in that plea mentioned to be paid into Court, in full satisfaction and discharge of the causes of action comprised by the said residue of the said declaration, whereupon the plaintiff says that he will not further prosecute his suit against the defendant in respect of the causes of action comprised by the said residue of the said declaration." The plaintiff, by his particulars of demand, claimed 20*l.* 15*s.* At the trial before Mr. Serjt. *Arabin* in the Sheriff's Court of London, the defendant proved his set-off to the amount of 8*l.* 3*s.* The price charged for the clothes, which were proved to be returned, appeared to be 8*l.* 3*s.* 6*d.*, and these two sums, together with the 4*l.* 8*s.* 6*d.* paid into Court, made up the whole sum of 20*l.* 15*s.*, which was claimed by the particulars of demand. The jury found the set-off to the amount of 8*l.* 3*s.*, and that the clothes were returned to the plaintiff. It was then contended that the plaintiff was entitled to a verdict for 2*l.* on the first issue, as there was no plea of the general issue. Mr. Serjt. *Arabin* directed the verdict to be entered for the defendant generally, but gave the plaintiff leave to move on the point. A rule having been obtained to shew cause why the postea should not be delivered to the plaintiff, and a verdict entered for him on the first issue as to the sum of 2*l.*, and why he should not have leave to sign judgment for that amount,

Gurney shewed cause.—The defendant at the trial proved a set-off for 8*l.* 3*s.*; the clothes returned amounted to 8*l.* 3*s.* 6*d.*, and the sum paid into Court was 4*l.* 8*s.* 6*d.*, which sums together amount to the sum claimed

(*a*) See the rule H. T. 4 *W.* 4, s. 17 of Pleading Rules, 2 Dowl. P. C. 320.

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by the particulars of demand, so that the plaintiff is not entitled to the verdict. But then it is contended, that as the defendant has not proved to the extent to which the plea of set-off is pleaded, that the plaintiff is entitled to a verdict for the difference, as there is no plea of nunquam indebitatus to the whole declaration. It may be true that the plaintiff is entitled to a verdict for this difference on the first issue, but that will not entitle him to a general judgment for that amount, which, together with the general costs of the cause, it is the object of this rule to obtain, contrary to the justice of the case. As in the case of *Cousins* v. *Paddon* (*a*), the excess proved on one of these pleas may be transferred to the deficiency on another; and as in that case, so in this also, the defendant is entitled to the judgment on the whole record. These pleas are drawn precisely in the way recommended by *Parke*, B. in the case of *Coates* v. *Stevens* (*b*).

Busby, contrà.—The defendant having chosen in his pleas to single out certain particular sums to which each plea is pleaded, is bound by those pleas, and cannot transfer any excess on one to any deficiency on the other. He first pleads to a sum of 10*l.* 3*s.*, then to another sum of 8*l.* 3*s.* 6*d.*, and then to the *residue* of the demand; that must mean the residue, after deducting the two sums to which the first pleas are pleaded. In *Comyns' Digest*, title Pleader (E 1,) it is said, "If the plea does not answer to every part of the declaration, it is a discontinuance of the whole." Again, (E 27,) "If a plea goes only to part, it must ascertain the part of the declaration to which it is applied." In *Grimwood* v. *Barrit* (*c*), the Court held that an averment of a certain sum in a plea was material. That case was recognised in *Marks* v. *Lahee* (*d*), where it was held, that the sum specified in a plea of tender was the material point of the issue, though alleged under a scilicet. Here, therefore, the defendant having singled out the sum of 10*l.* 3*s.* in his first plea, and having failed to prove the whole of that amount, the plaintiff is entitled to a verdict and judgment for the difference. The case of *Cousins* v. *Paddon* is distinguishable from the present, as in that case there was a plea of nunquam indebitatus to the whole declaration, and therefore, though under one plea the defendant failed as to part, yet under the plea of nunquam indebitatus, he succeeded as to that part, and was, therefore, entitled to the general judgment. Here there is no plea to the 10*l.* 3*s.* mentioned in the first plea, except that plea. In the case of *Hurst* v. *Watkis* (*e*), it was held, that although a plaintiff could not go out of his particulars of demand, yet if the defendant's evidence shewed that there were other items due, the plaintiff was entitled to recover them. The principle of that decision is applicable to this case, as this defendant shews, not by parol evidence, but on the record by the plea of set-off, that a sum of 2*l.*, not claimed by the particulars of demand, is due to the plaintiff, and he is therefore entitled to recover it.

Cur. adv. vult.

COLERIDGE, J. afterwards (June 12th) gave judgment.—This was a ques-

(*a*) 1 Gale, 305; 4 Dowl. P. C. 488; 2 Cromp. M. & Rosc. 547; 5 Tyr. 535.
(*b*) 3 Dowl. P. C. 784; 1 Gale, 75; 2 Cromp. M. & Rosc. 118; and see *Topham* v. *Kidmore*, *ante*, 341.
(*c*) 6 Term Rep. 460.
(*d*) 3 Bing. N. C. 408.
(*e*) 1 Campb. 68.

tion as to entering a verdict under peculiar circumstances. It was an action of debt, and the declaration demanded the sum of 37*l.* 16*s.* There were three counts, for goods sold, for work labour and materials, and for money due on an account stated, each of which demanded the sum of 12*l.* 12*s.* By the particulars of demand the sum of 20*l.* 15*s.* was claimed. The pleas were, first, as to 10*l.* 3*s.*, a set-off; secondly, as to 8*l.* 3*s.* 6*d.*, that the goods were returned on acconnt of being improperly made; thirdly, as to the *residue* of the debt in the declaration mentioned, the plaintiff paid 4*l.* 8*s.* 6*d.* into Court. Issues were taken on the two first pleas, which it was for the defendant to prove. On the first, the jury found that the plaintiff was indebted to the defendant on a set-off in the sum of 8*l.* 3*s.*, leaving therefore 2*l.* of the sum mentioned in the first plea uncovered. On the second issue, the jury found for the defendant that the goods were returned. (His lordship then recited the plea of payment into Court and the replication thereto.) Now the particulars of demand claimed 20*l.* 15*s.*; the defendant has pleaded to 22*l.* 15*s.*, and has proved to the extent of 20*l.* 15*s.*, so that in fact he has proved satisfaction of every farthing of the amount claimed. But then he has left out the sum of 2*l.* which was not covered by the proof given on the first issue, and which is admitted by the plea of set-off to be due. On this it was contended, that the verdict must be entered for the plaintiff on the first issue for 2*l.*, which would entitle him to the general judgment, and to the general costs. It is a question, under the circumstances, how this verdict ought to be entered. A case was referred to of *Cousins* v. *Paddon*, on which I think this case must be decided. In that case it was an action of debt, and the pleas were, first, nunquam indebitatus; secondly, as to 338*l.*, payment to that amount in satisfaction; thirdly, as to 500*l.*, a set-off. Now at the trial the only amount proved by the defendant under the second plea was 314*l.* 3*s.*, and therefore the difference between that sum and 338*l.* was uncovered by the evidence. That case decides, in the first place, that the defendant could not on that plea enter the verdict entirely for himself, as the sum of 338*l.* stated in the plea was a material sum, and having proved only 314*l.* 3*s.*, therefore the residue was uncovered. I think it follows from that case, that if that plea only had been pleaded, a verdict must have been entered for the plaintiff; for the Court decided, that in order to support the plea, the parcel of the debt stated in the plea must be proved, and he had failed to prove it. But the Court goes on to state that the plea may be taken distributively, and found as to part for the defendant, and as to part for the plaintiff. Now then that case, as far as that plea is concerned, had it alone been pleaded, shews that the plaintiff was entitled to judgment for the difference, but in entering up the verdict the Court say it must be entered for the defendant on the plea of nunquam indebitatus as to the whole sum demanded, except the amount proved on the other pleas, consequently giving the defendant judgment on the whole record. As therefore there was a plea of nunquam indebitatus in that case, the difference between the amount to which the plea was pleaded and that proved was covered. In this case, however, there is no such plea, and I must see if there is any thing equivalent to it. Now in the first place it was contended, that the excess on one plea might be transferred so as to cover the deficiency on another; but I think it is enough only to read over the record to see that that cannot be done in this case. Then as to the sum paid into Court, with a view to which it was that I read

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over that plea and the replication to it. The plea is, "as to the *residue* of the said supposed debt in the declaration mentioned;" that must be the residue after deducting the two sums mentioned in the two first pleas, and therefore excluding the 2*l.* not proved on the first plea. Now in the first place this is not a plea in bar, it only states that the plaintiff ought not *further* to maintain his action, and then that he *is* not indebted to a greater amount, not that he *never was*, in respect of the causes of action in the declaration mentioned. To that he says he is not *now* indebted beyond that sum, but does not say that he never was indebted; therefore there is no issue joined as to the original existence of the debt, and this still leaves the plaintiff entitled to nominal damages. The replication is, that the plaintiff accepts the sum of 4*l.* 8*s.* 6*d.* in satisfaction of the cause of action comprised, by the *residue* of the declaration. At first I was in hopes that by what follows it was in the nature of a nolle prosequi, but it is only that he will not further prosecute his suit in respect of the causes of action comprised by the said residue of the said declaration; still therefore I cannot see how the 2*l.*, which is part of a *material* sum which is admitted to be due, is covered. Although my opinion does not meet the justice of the case, as according to what is proved nothing is due, yet I must decide secundum allegata et probata. The 2*l.* being thus uncovered, I much regret that there must be a verdict and judgment entered for the plaintiff for this 2*l.* on the first issue, which of course will carry the general costs. The rule, therefore, must be made absolute.

Rule absolute.

Ex parte CREWSE and two others.

Held, that no further indulgence could be given for non-compliance with the rules of H. T. 6 *W.* 4, as to the notices requisite to be given previous to the admission of attornies, on the ground of ignorance of those rules.

ARMSTRONG, on the first day of term, (May 22d,) moved for an order of the Court to allow a notice given on the 20th at the Master's Office, for admission of a person as an attorney of the Court in next Michaelmas term, to be a good notice. The rule of H. T. 6 *Will.* 4, s. 5 (*a*), required the notice to be given three days before the term, but an affidavit was produced that the applicant did not know of that Rule of Court, and it was submitted, that similar excuses for not complying with the Rule of Court had been allowed in previous terms (*b*).

Cur. adv. vult.

Two other similar applications were made the same day, in which the Court also took time to consider what should be done.

COLERIDGE, J. (the next day.)—There were three cases mentioned yesterday as to the notices of admission of some persons as attornies of this Court. I have spoken to the judges on the subject, and we are of opinion that no further indulgence ought to be given. A long time has now elapsed

(*a*) 1 Har. & Wol. 639.
(*b*) *Ex parte Blunt*, 5 Dowl. P. C. 231; and *Ex parte Black*, 1 Will. Wol. & Dav. 73.

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since these rules were promulgated, and they must now be observed. I am sorry, therefore, to be obliged to refuse these applications.

Orders refused (*a*).

(*a*) See the five next cases.

Ex parte LOVEGROVE and another.

Where a notice for admission as attorney, as required by the rule of H. T. 6 *W.* 4, was given too late through the default of a London agent, the Court allowed the notice to be deemed good.

HANCE afterwards, on the first day of term, (May 22d,) moved for a similar order of the Court as in the last case, on an affidavit stating that the applicant was living in the country, and that his town agent had received proper instructions in time to give the notices three days before the term, but through the inadvertency of the agent, the notices had not been given until the 19th, which was too late.

COLERIDGE, J.—It is no doubt a hard case on the applicant, as it is not his fault, and therefore the order may be made; but it must be on the express understanding that the town agent pays the costs of this application.

W. H. Watson, the same day, made another similar application to *Coleridge*, J., which was granted in the same way (*b*).

(*b*) See *Ex parte Holland, post*, 349.

Ex parte MARTIN.

Where a notice for admission as an attorney was given too late, owing to information obtained at the office of the Incorporated Law Society, the Court refused to allow the notice to be deemed good.

N. R. CLARKE, on the 26th of May, moved for a similar rule as in the two preceding cases, on an affidavit stating that the applicant, on Wednesday the 17th of May, inquired at the office of the Incorporated Law Society, in Chancery Lane, as to when it was necessary to give the notices for examination in Michaelmas term, and was informed by a clerk that Saturday the 20th was the last day. The applicant, on the 20th, when giving the notices at the Master's Office, found that it was too late. It was submitted that the case was distinguished from that of *Ex parte Crewse* (*c*), as the mistake was owing to information given at a place where of all others it was to be presumed correct information could be obtained.

WILLIAMS, J.—I do not think this a case in which I can depart from the rule that has been laid down.

Order refused.

(*a*) The last case but one, and see the previous case.

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Ex parte BUSK.

A person allowed to be re-admitted as an attorney, although he had omitted from ignorance to give the notice at the King's Bench Office, as required by the old rule.

J. PAYNE, on the last day but one of the term, moved for the admission of a person as an attorney of the Court. He had given all the notices required by the new rules of H. T. 6 *Will.* 4 (*a*), for his examination and admission this term, but was not aware of it being also still necessary, under the old rule of T. T. 31 *Geo.* 3 (*b*), to affix a notice in the King's Bench Office, which had therefore been omitted. The Incorporated Law Society, who watched the admission of all persons as attorneys of the Court, had stuck up in the King's Bench Office a list of the persons who were desirous to be admitted, and Mr. *Busk's* name was in that list. He had been examined this term, and had obtained the examiners' certificate. It was submitted that this case was distinguishable from the former cases, where applications had been refused this term, as it was a case which arose on one of the old rules, and especially as the party's name had in fact been stuck up in the King's Bench Office, though not by the party himself.

COLERIDGE, J.—At the commencement of the term I took the opinion of all the Judges, and we all thought that by this time the new rules ought to be well known, and that no further indulgence ought to be granted (*c*). I think that resolution applies as well to all the rules for the admission of attornies. I cannot listen to this application on the ground that the name has in fact been stuck up in the office, for if I grant the application, the same may be done in all cases. Perhaps, however, under all the circumstances, the application may be granted.

Ordered accordingly.

(*a*) 1 Har. & Wol. 637.
(*b*) 4 Term Rep. 379.
(*c*) See *Ex parte Crewse*, *ante*, 346.

Ex parte COOPER.

A person who could not have the answers required by the examiners of attornies, within the time required, owing to the period of his service not expiring until a few days later, may yet be examined in the same term.

W. ALEXANDER applied, on the 2d of June, for an order of the Court to the examiners of attornies, to receive the articles of clerkship of Mr. *Cooper*, and to examine him for his admission this term. By a rule of the examiners, it was necessary that the articles of clerkship of every person who was intending to be examined, should be deposited with the secretary of the Incorporated Law Society, before the 29th of May, together with the answers to the questions required by the same rule. Mr. *Cooper's* service, under his articles, did not expire until the 1st of June, and, in consequence, his articles of clerkship had not been deposited, and it was impossible for the attorney whom he had served to say, on the 29th of May, that he had served the whole of his time. The examiners had, since his period of service expired, refused to receive the articles, or to permit him to be examined. The examination was to take place on the 5th of June. It was submitted, that this being a regulation of the examiners only, and not a Rule of Court, it

could not be imperative (*a*); and that it would be a great hardship on Mr. *Cooper*, because, if not examined this term, it would be necessary for him to give fresh notices for admission, and, consequently, he could not be admitted until Hilary term next.

Cur. adv. vult.

Coleridge, J. (the same day.)—I have spoken to Master *Le Blanc*, and he thinks that this order may be made without inconvenience. I did not like to make it in the first instance, as I am unwilling to interfere with the examiners, who must, of necessity, have some regulations as to the examinations.

Order made (*b*).

(*a*) See the rules 2 Har. & Wol. 1. They were approved of by the judges, according to the 2d rule of H. T. 2 *W.* 4, 1 Har. & Wol. 638.
(*b*) See the next case.

Ex parte Holland.

Cowling applied, on the 3rd of June, for an order of the Court to the examiners of attornies, to receive the answers of the person with whom Mr. *Holland* had served, to the questions required by the rules of the examiners (*c*). Mr. *Holland's* articles of clerkship, together with his own answers to the questions proposed to him, had been left with the secretary of the Incorporated Law Society in proper time; but, owing to the fault of the London agent, Mr. *Holland*, who was living in Dorsetshire, had not been informed so as to get the answers returned in proper time from the person whom he had served. The object of this motion was, that Mr. *Holland* might be examined in the present term; and it was submitted, that indulgence had, in previous terms, been granted to persons who, from ignorance of them, had not complied with the new rules for the admission of attornies, and that this was a case where the London agent was in fault, and not the party himself.

A person who could not have the answers required by the examiners of attornies within the time required, owing to the fault of the London agent, may yet be examined in the same term.

Coleridge, J.—The London agent ought to have taken notice of these rules, and to have informed the parties. I have already refused several orders this term, where indulgence has been asked on the ground of ignorance of the rules (*d*). The Judges cannot deal lightly with the rules of the examiners; I think, however, that this order may be granted, on condition of the London agent paying the costs of this application, which has been rendered necessary by his negligence (*e*).

Ordered accordingly.

(*c*) See these questions, 2 Har. & Wol. 3.
(*d*) *Ex parte Crewse and others*, *ante*, 346.
(*e*) See *Ex parte Lovegrove*, *ante*, 347, and the previous case.

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common bail, the defendant shall cause to be entered or filed within eight days after the day upon which the process, on which the defendant is arrested, shall be returnable, upon penalty of five pounds, to be paid to the plaintiff, for which the Court shall immediately award judgment, whereupon the plaintiff may take out execution." This is a penal enactment, and will be construed strictly. Now, the penalty is given, if the appearance is not entered within eight days after the day on which the process on which the defendant is *arrested* is returnable; but in this case the defendant was served with a writ of *summons*, on which he never could be arrested. This act is, moreover, virtually repealed by several subsequent statutes. At the time of the passing of the act, there was a kind of process, which was returnable on a particular day, and was contemplated by the act. That process is now entirely abolished by the Uniformity of Process Act, 2 & 3 *Will.* 4, c. 39, and the writ of summons is substituted, which is not returnable on a day certain. At the time of the passing of the 9 & 10 *Will.* 3, c. 25, defendants *might*, moreover, be arrested for any sum however minute, as appears by reference to *Blackstone's Commentaries* (*a*). Special bail, however, could not in all cases be enforced, and hence the expression in that act, which refers to *common bail* being filed on process, by which the defendant may be *arrested*. That was the state of the law until the passing of the 12 *Geo.* 1, c. 29, by which the power of arrest was limited to cases where the cause of action amounted to 10*l.* or upwards. By that act, the power of holding persons to special bail, and of arresting them, was made co-extensive, and thereby the clause in 9 & 10 *Will.* 3, c. 25, now relied on, became a dead letter, there being no process under which a defendant could be arrested, on which common bail could be filed. That such was the effect of the act of 12 *Geo.* 1, c. 29, may be inferred from the fact of no case having since occurred where this penalty has been enforced. There was a previous anonymous case, which is reported (*b*); and though the case of *White* v. *Holland*, which is the latest case that can be found, appears to be subsequent, yet, as the act of 12 *Geo.* 1, c. 29, which passed in 1725, was not to take effect until the 24th of June, 1726, that case is a case before the statute; or, if that is doubtful, it may have been on process previously issued, and is not a case to be relied on. In the case of *The Bank of England* v. *Anderson* (*c*), *Tindal*, C. J. lays great stress on usage, as shewing the construction that is to be put on an act of parliament. In *Tidd's Practice* (*d*), this enactment in 9 & 10 *Will.* 3, c. 25, is treated as repealed. The legislature appears also to have been aware, that the effect of the statute, 12 *Geo.* 1, c. 29, would be to repeal the clause in 9 & 10 *Will.* 3, c. 25, giving this penalty; for it is then, for the first time, that power is given to plaintiffs to enter appearances for defendants, thereby giving a new remedy instead of the old one. That that clause was repealed, may also be inferred from their having been subsequent statutes, imposing stamp-duty on common bail, which have now re-enacted this penalty. Again, that clause is repealed by statute 5 *Geo.* 4, c. 41, which repeals the duties on legal proceedings, and this may be considered merely as a penalty for enforcing the duty. It is also impliedly repealed by the Uniformity of Process Act, 2 & 3 *Will.* 4, c. 39, which, by sect. 1, substitutes alto-

(*a*) Vol. 3, p. 287.
(*b*) 5 Mod. 392.
(*c*) 2 Hodges; 3 Bing. N. C. 666.
(*d*) 9th edition, p. 240, note.

gether a new process for that previously used, by sect. 2, enacts a new method of appearance, and, by sect. 16, enacts the consequences of non-appearance. In the cases of *Wigley* v. *Tomlins* (*a*), and *Nurse* v. *Geeting* (*b*), it has been held in the same way that the Uniformity of Process Act impliedly repeals imparlances.

Tyndale, contrà.—If the case of *White* v. *Holland*, did not occur subsequently to the statute 12 *Geo.* 1, c. 29 coming into operation, and cannot, therefore, be cited as an authority, still, there is no reason why this rule should not be made absolute. At common law the plaintiff had no means of compelling the defendant to enter an appearance; but the statute 9 & 10 *Will.* 3, c. 25, sect. 33, first gave a remedy for this inconvenience, and that enactment must be considered entirely as one for the benefit of plaintiffs, and not as a mere fiscal regulation for the enforcement of the stamp duties. It is to be remarked, in corroboration of that view of the enactment, that this penalty is given to the *plaintiff*, not to his attorney, to whom it would most likely be given, if it was for the purpose of enforcing the duty merely, as the attorney is the most likely person to be aware of the act not having been complied with. Being, then, an enactment for the furtherance of suits, and not for the enforcement of stamp duties, it is not affected by any subsequent stamp acts which do not directly repeal it. Next in succession to this enactment is the act of 12 *Geo.* 1, c. 29, giving the plaintiff power to enter an appearance for the defendant, but that act did not take away the old remedy. There is nothing inconsistent in the two acts, and both may stand together, the latter remedy being cumulative on the other. That principle is recognised in the case of *Sharp* v. *Warren* (*c*). It cannot be contended that the Uniformity of Process Act impliedly repeals this penalty, for that act rather recognises the previous law as to entering appearances under the statute 12 *Geo.* 1, c. 29, and, consequently, must be considered as recognising this penalty also.

Cur. adv. vult.

COLERIDGE, J. afterwards (June 10th) gave judgment.—This was a rule, calling on the defendant to shew cause why the judgment of the Court should not be given against him, pursuant to the 9 *Will.* 3, c. 25, for the penalty of 5*l.* for not having entered an appearance to the writ of summons issued against him. The question on the argument was, simply, whether the clause of the statute in question was repealed, it being scarcely denied, that, if the clause was still in operation, the case was within it. The clause is in terms as follows. (The learned Judge recited it.) In the ordinary sense of the term there is no doubt that this clause has long become obsolete. Although found in a stamp act, the penal part of it appears to have been introduced, not for the protection of the revenue, but to aid plaintiffs in enforcing the appearance of defendants, at a time when the provisions of the law were very deficient in that respect. It seems, accordingly, to have been acted upon till the passing of the 12 *Geo.* 1, c. 29, which empowered the plaintiff, as is well known, upon affidavit of personal service, to enter the appearance for the

(*a*) 3 Dowl. P. C. 7.
(*b*) 3 Dowl. P. C. 157.
(*c*) 6 Price, 131.

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defendant. From that period, or almost immediately after it, it was not shewn that any recourse had been had to it; the provisions of the last-named statute appear to have been considered as a substitute; and, when the additional powers are remembered with which plaintiffs are now armed, under the Uniformity of Process Act, it would certainly seem very unnecessary to keep alive such an enactment as the one in question. No statute, however, repealing it in terms, has been mentioned in the learned and laborious argument which was addressed to the Court on shewing cause against the rule; reliance was placed only on the implications of a repeal, which might be derived from the 12 *Geo.* 1, c. 29, and 2 & 3 *Will.* 4, c. 39. Upon consideration, I cannot say that this mode of reasoning has satisfied me; this penal clause may well stand with the provisions of the later statutes, and when that is the case, I apprehend that it is contrary to the rules of legal construction, to hold, that a later works, by implication, the repeal of a more ancient statute.

But I think the rule may be discharged upon a safer ground. The penalty attaches upon the neglect to enter the appearance within a certain time after the return-day of the process; the appearance, however, to be so entered, is one that has been written upon stamped vellum, parchment, or paper; and so long as the same or any additional duty remained imposed on common appearances, it might be contended that there was a subject-matter on which the clause might operate. By the repeal of stamp duties on legal proceedings, and on appearances among others, specified by 5 *Geo.* 4, c. 41, mentioned in the argument, it has been impossible for the defendant to comply in terms with this enactment, and the plaintiff has no right in the enforcement of a penal clause, to insist on a compliance with it *cy près*. In this way, for want of a subject-matter to operate on, I am of opinion that the clause may be considered as repealed, and, consequently, that this rule must be discharged.

And, as this has been an experiment to revive the operation of a statute always somewhat severe, and unnecessary at present to advance the ends of justice, whatever might be the propriety of it when enacted, and which for more than a century has been by common consent abandoned, the plaintiff must be content to pay for it, on failure, by having his rule discharged with costs.

Rule discharged, with costs.

Ex parte SHARPE.

Where a client had a claim on his attorney for a sum of money received by him in a cause: —*Held*, that the client's remedy by action being barred by the Statute of Limitations, was not a reason to prevent the Court exercising its summary jurisdiction.

THIS was a rule calling on an attorney to shew cause why he should not pay over a sum of 21*l.*, which he had received as attorney in a cause wherein the applicant *Sharpe* was plaintiff and *Hawker* defendant. It appeared on the affidavits, that the money was received by the attorney in the year 1828, and that he did not then pay it over, as *Sharpe* was in prison, and had petitioned for his discharge under the Insolvent Act. A long period elapsed which was not accounted for on the affidavits, but it was stated, that in the year 1835 a letter was written to the attorney asking for the money, as *Sharpe* was out of custody, and his petition for his discharge under the Insolvent Act had been dismissed. On the affidavits in opposition to this rule the attorney stated, that he believed a balance was due to him for business done, and that if an action was brought for it he intended to plead

a set-off, and the Statute of Limitations. It did not appear that he had ever made out any account for the business done.

Whitmore shewed cause.—This rule cannot be made absolute, as the lapse of time alone is sufficient to shew that the attorney is not entitled to ask for the exercise of the summary jurisdiction of the Court. If an action were brought for this money, there would be a clear defence under the Statute of Limitations, and there would be the same injustice done by the Court making such a rule as the present absolute, as it was the intention of the legislature to remedy in passing that statute. Mr. Justice *Littledale*, in the case of *Ex parte Yeatman* (*a*), discharged a rule similar to the present, on the principle that the time within which an action must be commenced had elapsed. In that case certainly a much longer time had elapsed, but still that was the main ground of his decision, as appears from both the reports of the case. The rule laid down in that case is a good and convenient rule for the Court to act upon. If the Court should be of opinion that this application is not barred by the lapse of time, it is a case which must be referred to the Master.

Humfrey, contrà.—There is no objection to this matter being referred to the Master, if the Court will direct him not to consider the Statute of Limitations as a bar to the investigation of the claim. The case of *In re Greaves* (*b*), which was a decision of the full Court of King's Bench, decided that the Court would summarily give relief to a party in a case where he had no remedy whatever at law, the agreement which it was sought to enforce being void by the Statute of Frauds. So here, although this claim is barred by the Statute of Limitations, yet the Court will enforce it. The authority of that case was recognised in the case of *Evans* v. *Duncombe* (*c*), and again *In re Paterson* (*d*); and those cases are express authorities to shew that the Court will interfere, although the subject is a matter which cannot be enforced by action. Against those authorities the only case that can be cited is that of *Ex parte Yeatman*, which was the decision of a single judge. That case moreover is distinguishable; there the application was not made until thirteen years had elapsed, during which time no application whatever had been made for the money. *Littledale*, J. moreover seemed to intimate that it was not an application which was to be encouraged, even if it had been made immediately after the transaction took place. He also expressly distinguishes the case from both the classes of cases in which the Court will exercise the summary jurisdiction of the Court. It is clear that his judgment did not proceed mainly on the ground of the lapse of time, but, that that was only one of the circumstances which led to his decision. If that case is to be considered as laying down the rule that the lapse of six years is a bar to applications like the present, then the case of *In re Greaves* is overruled, for there the transaction was absolutely void by statute and yet the Court granted the rule, while in *Ex parte Yeatman* it was merely that the claim was barred by statute. The other cases would also be equally overruled.

(*a*) 1 Har. & Wol. 510; 4 Dowl. P.C. 304.
(*b*) 1 Cromp. & Jerv. 374 n.
(*c*) 1 Cromp. & Jerv. 372; 1 Tyr. 283.
(*d*) 1 Dowl. P.C. 468.

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COLERIDGE, J.—I think that my brother *Littledale* did not intend to discharge the rule in the case of *Ex parte Yeatman* merely on the ground that the time allowed by the Statute of Limitations had long since elapsed, but that he took that as one guide for exercising his discretion in using the summary jurisdiction of the Court. That is the true view of that case. So here also, it is not sufficient to say merely that this claim is barred by the Statute of Limitations. The question therefore is, whether the lapse of time is such that I am not called on to exercise the summary jurisdiction of the Court. I could have wished that on the one side it had been shewn by the affidavits more clearly why the party was not called on earlier to pay over this money, and on the other side, why in consequence of that delay justice cannot be now done between the parties. The ground on which this motion is made is, that the attorney has received a sum of money from a person whom his client intrusted him to sue, and that his duty when he had received that sum from the party was to tax his costs and pay over the balance to his client. That is a very different case from the case of *Ex parte Yeatman*. Here, the attorney received the money sought to be recovered in the action, and having received the money it was his business to tax his costs and make out his account. He has not, however, made out any account, nor given any reason why he has not done so. It seems therefore to me, that the applicant is not barred by the lapse of time, and that justice will best be done by referring the matter generally to the Master. I say generally, without any direction as to the Statute of Limitations, as I do not think that the Master will consider himself bound by the Statute of Limitations from investigating the whole of the matter.

Rule referred accordingly.

Ex parte CRIPWELL.

An attorney was employed to prepare some mortgage deeds, and afterwards received the money raised by the mortgage:—*Held*, that he might be called on summarily to account for the money.

THIS was a rule calling on an attorney to shew cause why he should not deliver his bill of costs to the applicant, and pay over a balance of money which he held, and deliver up all deeds and papers. It appeared on the affidavits, that he had been employed by the applicant to prepare the deeds for raising two sums of 300*l.* and 1500*l.* on mortgage; that he did prepare the deeds, and received the two sums of money; that he had then paid various sums at the request of the applicant, leaving above 200*l.* in his hands; and that he had refused to pay over this balance, or deliver his bill of costs.

Cresswell shewed cause.—It does not appear that the attorney received this money in his character of attorney; there was no suit pending in which he received it, and it is not therefore a case in which the Court will exercise its summary jurisdiction. In the case of *Ex parte Aitkin* (*b*) the Court carried its jurisdiction to its utmost length, and indeed it has been questioned since whether the Court did not in that case exceed its authority. *In re Murray* (*c*) may be distinguished from the present, for there the application was

(*b*) 4 Barn. & Ald. 47. (*c*) 1 Russ. 519.

principally to deliver up deeds and papers, but in this case it does not appear that there are any deeds, the application being in fact merely to render an account of monies received and paid. It is similar to the case of *Ex parte Schwalbauker* (*a*), where such an application was refused. *In re Bonner* (*b*) is a case to the same effect. These cases were decided on the ground that they were the ordinary cases of debtor and creditor, and that the attornies had not acted as officers of the Court, and could not therefore be called on to account by means of a summary application.

Hoggins contrà.—The judgment of *Abbott*, C. J. in *Ex parte Aitkin* is strongly in favour of this rule. He there says, that where the employment of an attorney is so connected with his professional character as to afford a presumption that his character formed the ground of his employment, there the Court will exercise their jurisdiction. He afterwards says, "Inasmuch as a conveyance requires knowledge of law, the trust is reposed by the client in the party, in respect of his being an attorney." That is the present case; the attorney was employed in his character of attorney to prepare a conveyance by way of mortgage, and afterwards received the money in consequence of such employment. The judgment of the Court in *Ex parte Schwalbauker* is also in favour of this rule, although the application in that case was refused. *De Wolfe* v. —— (*c*) and *In re Murray*, are also direct authorities for making this rule absolute.

Coleridge, J.—I think that this rule must be made absolute. I never heard but that the case of *Ex parte Aitkin* was considered good law. It certainly is an authority which has been acted on in many cases since; and though it has not been considered right to carry the jurisdiction of the Court further, I see no reason on principle why that case should not be considered good law. If a person is employed in his character of attorney, he is amenable as such as an officer of this Court. In this case the party has received the money because he was an attorney; in the first instance he was employed to prepare some mortgage deeds; in the ordinary meaning of those words that must have been an employment as an attorney, and I cannot doubt but that he also received the money as an attorney in consequence of having prepared those deeds.

Rule absolute.

(*a*) 1 Dowl. P.C. 182. (*b*) 4 B. & Adol. 811; 1 Nev. & Man. 555. (*c*) 2 Chit. 68.

Lewis *v.* Grimstone.
The Same *v.* Wheatley.

Service of a writ of summons on bail after notice of the render of the principal is irregular, and will be set aside.

THESE were two seperate actions against two bail on the recognisance of bail. The ca. sa. issued against the original defendant returnable on the 22d of May. It was returned on that day non est inventus. Afterwards, on the same day, the plaintiff sued out these two writs of summons against the bail. Later in the day the defendant rendered in discharge of his bail, and notice of the render was given the same evening to the plaintiff, who was an attorney suing in person. The following morning the two writs of summons

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against the bail were served. Two rules having been obtained on the 26th of May, calling on the plaintiff to shew cause why the service of the writs should not be set aside, or why, on payment of the costs incurred, exclusive of the costs subsequent to the writ of summons, the proceedings should not be stayed.

Hoggins shewed cause.—The rule on which proceedings are now stayed against bail is the rule of T. T. 3 *Will.* 4 (*a*).—[*Coleridge*, J.—That rule does not apply to this case, which is a question as to an earlier period of the proceedings.]—It appears from the case of *Byrne* v. *Aguilar* (*b*), that the practice of this Court is to stay the proceedings against the bail on payment of costs. *Abbott* v. *Rawley* (*c*) also shews that to be the practice of the Court of C. P. At any rate the plaintiff is entitled to have his costs incurred up to the time of the notice of the render.

J. W. Smith, contrà.—The service of the writs of summons after the notice of the render was irregular, *Byrne* v. *Aguilar*; the Court therefore will set aside this service. In *Smith* v. *Lewis* (*d*) that decision is confirmed, and from that case it appears that the bail are entitled to have the proceedings stayed without the payment of costs. In *Creswell* v. *Hern* (*e*) the Court decided that the bail was not liable to the costs up to the time of the notice of render. It is submitted, therefore, that the plaintiff is not even entitled to the costs up to the time of the notice of render, and that at all events the Court will not compel the defendants to pay the costs of the irregular proceedings since.

COLERIDGE, J.—It appears to me that there is some difficulty in saying that the plaintiff is entitled to the costs of the writs of summons, as on the one side there are the cases of *Byrne* v. *Aguilar*, and *Abbott* v. *Rawley*, and on the other side the cases of *Creswel* v. *Hern* and *Smith* v. *Lewis*. But the cases all shew that the service was irregular after the notice of the render, and therefore the first part of these rules must be made absolute.

Rules absolute as to the first part.

(*a*) 2 Dowl. P.C. 397.
(*b*) 3 East, 306.
(*c*) 3 Bos. & Pul. 13.
(*d* 16 East, 168.
(*e*) 1 M. & Selw. 742.

Ex parte MOFFATT and DEWE.

A creditor of an insolvent clergyman cannot have a rule calling on a bishop to render an account of monies received under a sequestration obtained under the Insolvent Act.

THIS was a rule calling on the Bishop of *Rochester* to shew cause why he should not render an account of the monies he had received under a sequestration of the perpetual curacy of Strood, in Kent. The perpetual curate of that place had taken the benefit of the Insolvent Debtors' Act, 7 *Geo.* 4, c. 57, and his assignees had applied to the Bishop of *Rochester* under the 28th section for a sequestration, which had been granted in the usual form. The sequestrator not having rendered a sufficient account of his receipts, the applicants, who were two creditors of the insolvent, but not his assignees, applied to the Insolvent Court for an order on the bishop to render an account. The Insolvent Court refused the order, saying that they had

no authority over him. In consequence of the refusal the present application was made.

Henderson in shewing cause was stopped by the Court, who asked what title a creditor had to make the application.

J. Espinasse, contrà.—The present applicants are admitted to be creditors of the insolvent on his schedule, and the Insolvent Court refused this application on the ground that they had no power over the bishop. The assignees are hostile to these applicants, who are the parties really interested; and it is submitted that under the 28th section, which directs that a sequestration shall issue, "as the same might have been issued upon a writ of levari facias founded upon any judgment against such prisoner," these creditors have sufficient title to induce the Court to grant this rule.

COLERIDGE, J.—These creditors have no title to make this application against the bishop. This may be a case in which such a rule would be granted to the assignees of the insolvent, but if the present rule were made absolute the assignees might come to-morrow, when it would be equally necessary to grant them a similar rule. The creditors are strangers to the bishop, who can only be called on to account to the assignees who set him in motion. The rule must be discharged, and with costs, as it is moved against a public officer.

Rule discharged with costs.

DOE *d.* The Marquis of WESTMINSTER *v.* SUFFIELD.

It is no reason why the lessor of the plaintiff should not have execution in ejectment for not confessing lease, entry, and ouster, that the defendant had taken the benefit of the Insolvent Act, and did not therefore appear, having no interest.

THIS ejectment was brought to recover premises for a forfeiture by non-payment of rent. After entering into the consent rule, the defendant petitioned for his discharge under the Insolvent Act, and inserted the Marquis of *Westminster*'s name in his schedule for the amount of his rent. The defendant was discharged, and afterwards at the trial did not appear to confess lease, entry, and ouster, whereupon the plaintiff was nonsuited. On a rule to shew cause why the lessor of the plaintiff should not be at liberty to sue out execution, as the defendant did not appear at the trial according to the consent rule,

Humfrey shewed cause.—The defendant being at the time of the trial denuded of all interest in the premises, he could not have appeared, as it was his assignee alone who had any interest.—[*Coleridge*, J.—Who is now shewing cause against this rule?]—The person interested is a mortgagee of the defendant.—[*Coleridge*, J.—He can have no interest against the Marquis of *Westminster*.]—The marquis ought to come in and take his dividend with the other creditors.

Cooper, contrà, was stopped by the Court.

COLERIDGE, J.—I do not see how the assignee of the defendant or his mortgagee can have any defence, but if they have, they should have appeared and defended the action. The rule must be made absolute.

Rule absolute.

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BURT *v.* BRYANT.

If the warden of the Fleet refuses to obey a habeas corpus to remove a defendant into the King's Bench prison, on the ground that a commitment fee is unpaid, but which the defendant contends the plaintiff ought to pay, the defendant should obtain a rule calling on the warden to obey the habeas corpus, and may not pay the fee, and then call on the plaintiff summarily to repay it.

THE defendant had been for some time a prisoner in the King's Bench prison, and about the end of last year judgment was signed against him in this action in the Court of Exchequer, and he was brought up by the plaintiff on habeas corpus in that Court, and was charged in execution and committed to the Fleet prison. The defendant then procured a habeas corpus to remove himself back into the King's Bench prison, but previous to his being removed the warden of the Fleet demanded the commitment fee, due to him on the defendant being charged in execution by the Court of Exchequer, and which the plaintiff had not paid. The defendant paid the fee and was removed. The plaintiff was an attorney of this Court, but not of the Exchequer. A rule having been obtained, calling on the plaintiff and his attorney to shew cause why they should not return the commitment fee, paid by the defendant to the warden of the Fleet,

C. C. Jones shewed cause.—This is an application to the summary jurisdiction of the Court, as the plaintiff in the cause in the Exchequer and his attorney are both attornies of this Court. This rule is moved for, on the ground that it was the duty of the plaintiff to pay the fee to the warden on charging the defendant in execution, but that is not the case, as it was the duty of the defendant himself to pay it. Even supposing it was the plaintiff who ought to have paid it, the defendant has paid it in his own wrong, as he need not have paid it to the warden, and if the warden refused to obey the order of the Court the defendant should have applied to the Court. The present rule is quite unprecedented.

Humfrey, contrà.—The invariable practice is, that the commitment fee should be paid by the party charging the defendant in execution.—[*Coleridge*, J.—If it was the duty of the plaintiff to pay the fee, what right had the warden to detain the defendant, and therefore why did he pay it?]—If he had not paid it, he would still have remained in the custody of the warden. It is far preferable that he should be allowed to pay it and then apply in this way to the Court, than that he should have to contest the matter with the warden.

COLERIDGE, J.—I think that this rule cannot be made absolute. It cannot be supported without the assertion that it is the plaintiff's duty to pay the fee. If that be so, this rule may lead to bad consequences, for if the defendant was compelled to pay the fee to the warden, he should have called on the warden to obey the order of the Court; this the Court would have obliged him to do, and would not have allowed the excuse for not obeying the order that some other person had not paid a fee on a previous occasion. It would have been better therefore not to have paid the fee, but to have applied for a rule calling on the warden to obey the order of the Court. Parties should be compelled to proceed in a straightforward way. The rule therefore must be discharged, but not with costs.

Rule discharged.

SOUTER *v.* HITCHCOCK.

In debt on bond for breach of covenants in a lease, the Court refused to compel the plaintiff, before plea pleaded, to give a particular of the sums unpaid for rent, and of the breaches by non-repair, for which the action was brought.

THIS was an action of debt on a bond for the performance of the covenants in a lease. The defendant was assignee of the original lessee. The declaration had been delivered, in which no breaches were assigned. The defendant's attorney had obtained the order of a judge for the particulars of the covenants, for the breach of which the action was brought, whereupon a copy of the covenants to pay rent and to repair the premises was delivered. An order was then applied for, for better particulars, setting out the sums which were unpaid for rent, and the dates when they were due, and for a specification of the breaches of the covenant to repair. This order was refused by *Williams*, J. at chambers, whereupon a rule nisi for such further particulars was obtained.

R. V. Richards shewed cause.—This application is quite unnecessary, as the defendant may plead performance generally. The plaintiff will assign breaches in his replication, after which this application, if at all, should be made. It is, moreover, impossible for the plaintiff to give particulars of the repairs that have not been done according to the covenant, as it is not the plaintiff who is in possession, but the defendant himself, who must, therefore, be better acquainted with the state of the premises.

Hoggins, contrà.—The plaintiff may have a right to enter on the premises, under a covenant in the lease, for the purpose of ascertaining the state of the premises; and it ought to be shewn, on the other side, that he has not such a right. The plaintiff must know for what he has brought his action. Unless this application is granted, the defendant will not know what to plead.—[*Coleridge*, J.—The defendant may plead performance generally, the plaintiff will then assign breaches in his replication, after which it will be time to make this application. If the defendant does not plead performance, what can he plead?]—The defendant being assignee of the original lessee, cannot possibly know all the different breaches of covenant there may have been, either in non-payment of rent, or in non-repair of the premises. In the case of *Doe* d. *Birch* v. *Philips* (*a*), which was an action of ejectment for the forfeiture of a lease, although a particular of the covenants, on the breach of which the plaintiff intended to rely, was offered, yet the Court ordered the plaintiff to give a particular of the breaches, thinking the application in its full extent highly reasonable. If the breaches are suggested on the record, instead of being assigned in the replication, the defendant will, moreover, be put to great inconvenience if he has not the particular he now wants; for, as on a suggestion the dates and sums of money, &c. will be stated under a videlicet, which will not be the case in a replication, the plaintiff will not be bound to prove them exactly as stated, so that the defendant will not know beforehand what he has to defend.

COLERIDGE, J.—The case cited has no bearing on the present question.

(*a*) 6 Term Rep. 597.

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No distinction can be clearer than that of an application to know what is the forfeiture on which a landlord has brought an ejectment, and the case where a landlord sues on a bond for the breach of covenants in a lease, or on the lease itself. As to the present application for particulars of the breaches, the plaintiff does not appear to know more than the defendant does. But then it is said, that this application ought to be granted *now*, as the plaintiff may suggest the breaches, instead of assigning them; and that if he does so, the defendant may be put in a situation of difficulty. I cannot see that to be the case, as the defendant may then go before a judge at chambers, who will order that whatever is right should be done. This rule must, therefore, be discharged.

Rule discharged.

The KING *v.* The Directors of the Poor of the Parish of ST. PANCRAS.

1. *Quære*, whether a justice has power, since the 4 & 5 *W.* 4, c. 76, s. 54, to order relief to be given to an infant found in a parish, it being unknown where the infant came from.

2. *Quære*, whether a person who takes care of such an infant, has any claim against the parish for his expenses.

3. In such a case, however, the Court issued a mandamus, immediately ordering the parish authorities to receive and provide for the infant.

IN the early part of May, a basket was left by a woman with the porter of the Foundling Hospital, with directions that it should be taken to the secretary of the hospital. On being opened it was found to contain a living infant. The woman who left it was not known, and could not be found. The secretary to the hospital had since taken care of the child, and, on application to the parish authorities of St. Pancras, in which parish the Foundling Hospital was situated, they had refused to take the charge of the child. An order was then obtained from a justice, under the 54th section of the Poor Law Amendment Act, 4 & 5 *Will.* 4, c. 76, ordering the overseers of the parish to relieve the child as in a case of necessity. This order the overseers had refused to obey, as the parish of St. Pancras was governed by a private act, 59 *Geo.* 3, c. xxxix, by which the management of the poor was vested in a body of forty directors, to the exclusion of the overseers of the parish (*a*).

Bodkin applied, on the 3rd of June, on the part of the secretary to the Foundling Hospital, for a mandamus to the directors of the poor of the parish of St. Pancras, commanding them to receive and provide for the child.—The order of the justice, already made on the *overseers*, cannot be supported, as the management of the poor is taken from the overseers by the local act. There is also a difficulty, inasmuch as the parish contend that they are not bound to provide for the child at all, the power of a justice in ordering relief, in cases of necessity, being now confined by the 4 & 5 *Will.* 4, c. 76, sect. 54, to persons *not settled, nor usually residing in the parish.* In this case, of course, it is unknown whether this child may not be settled, or usually resident in the parish of St. Pancras, and, therefore, the order of a justice may be invalid. There being no other remedy open to the party applying, it is submitted that the Court will grant a mandamus.—[*Coleridge*, J. —Is not the party applying a mere volunteer? He must have some legal right to enforce to entitle him to a mandamus.]—It is submitted, that he has

(*a*) See the case of *The King* v. *The Poor Law Commissioners*, *ante*, 79; and 1 Nev. & Per. 371.

a legal right, as he was justified in taking care of the child, and not suffering it to perish in the street.

COLERIDGE, J.—If he has a legal right, may he not enforce it by action? There may be a difficulty both ways; namely, that he has no right to enforce, and that the parish are not bound to provide for the child. I shall take time to consider the case.

Cur. adv. vult.

COLERIDGE, J. afterwards (Jan. 7th) said,—I think that this case is too doubtful to refuse the application. There must be a rule absolute for a mandamus to issue immediately (*a*).

Rule absolute.

(*a*) See *The King* v. *The Churchwardens of Edlaston*, 2 Har. & Wol. 429.

PRESTON *v.* WHITEHEAD.

If by mistake credit is given in the particulars of demand for sums which are disputed, the Court will allow the plaintiff to amend them.

R. V. RICHARDS shewed cause against a rule, calling on the defendant to shew cause why the plaintiff should not be allowed to amend the particulars of demand which he had delivered. By mistake in the particulars delivered, credit had been given for the very sums for which the action was brought; but it was submitted, that that was no reason why the plaintiff should be allowed to amend them.

Henderson, contrà, contended, that the mere mistake of the attorney in this respect, ought not to be allowed to conclude the plaintiff.

COLERIDGE, J. granted the application, and gave the defendant 14 days' time to plead.

Rule absolute.

COLLINS *v.* BEAUMONT.

A scire facias to revive a judgment, is a proceeding in the original cause, and is within the pleading rules of H. T. 4 W. 4; the pleadings in it must therefore be intituled according to those rules.

THIS was an action of scire facias, to revive a judgment. The defendant had obtained further time to plead, on the usual terms of pleading issuably; he afterwards demurred specially to the replication, and, amongst other causes of demurrer, stated, that the replication was not properly intituled. It appeared that it was intituled of the day of the month and year when it was pleaded, according to the 1st rule of H. T. 4 *Will.* 4 (*a*). The declaration and plea were intituled in the same way. The demurrer itself was in the form given by the same rules (*b*). A rule having been obtained to shew cause why the plaintiff should not be allowed to sign judgment, as for want of a plea, on the ground that the demurrer was contrary to the terms of the order for further time to plead, or why the demurrer should not be set aside, on the ground of its being frivolous:

(*a*) 2 Dowl. P. C. 313. (*b*) 2 Dowl. P. C. 319.

Bail Court.

COLLINS v. BEAUMONT.

Humfrey shewed cause.—The case of *Barker* v. *Gleadow* (*a*), is an answer to the first part of this rule. As to the second part, that this demurrer is frivolous, it depends on whether the 1st rule of H. T. 4 *Will.* 4, applies to actions of scire facias, and it is contended, on the part of the defendant, that it does not, and that, therefore, the replication, as well as previous pleadings, ought to have been intituled according to the old practice.—He then contended that two other grounds of demurrer, which were stated, were not frivolous.

Mansel, contrà.—The statute of 3 & 4 *Will.* 4, c. 42, s. 1, under which the pleading rules of H. T. 4 *Will.* 4, were made, refers to actions at law generally, and this scire facias is merely the continuation of the original action at law, and, therefore, the rule as to the intituling of pleadings applies as in other cases.—He also contended that the other grounds of demurrer were also frivolous.

COLERIDGE, J.—The two last grounds of demurrer are clearly frivolous. As to the first, it turns on the question of whether a scire facias is to be considered within the rule of H. T. 4 *Will.* 4, as to the intituling pleadings with the day of the month and year when they are pleaded. I think that it is, and, indeed, it has been so treated by the parties throughout the cause. Actions of ejectment (*b*), and real actions (*c*), have been held certainly not to be within the rules of H. T. 4 *Will.* 4; and, on this ground, the action of ejectment is a legal fiction, in which there is but one plea, and, therefore, to hold that action to be within those rules, would be to destroy it altogether. Real actions are confined to the Court of Common Pleas only, and, therefore, are not included within those rules which apply to all the Courts. I think, also, that a scire facias is to be considered as a proceeding in the original action. This rule must, therefore, be made absolute without costs, to set aside the demurrer, the defendant having leave to amend, on payment of the costs of amendment.

Rule accordingly.

(*a*) 2 Har. & Wol. 113; 5 Dowl. P. C. 134.

(*b*) *Doe* d. *Evans* v. *Roe*, 1 Adol. & El. 11; *Doe* d. *Fry* v. *Roe*, 3 M. & Scott, 370; *Doe* d. *Ashman* v. *Roe*, 1 Bing. N. R. 253; and *Doe* d. *Gillett* v. *Roe*, 4 Tyr. 649; 1 Cr. M. & Ros. 19; 2 Dowl. P. C. 690.

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Mandamus to the commissioners of woods and forests to compel them to pay poor rates for crown lands in their occupation, refused.

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within the said parish, or on any other person and persons who by law are chargeable and assessable for and towards the relief of the poor of the said parish, for such sum or sums of money as the said vestrymen, or any thirteen or more of them, shall order and direct." In the parish of Richmond are some lands belonging to the crown, which, by the statute 10 *Geo.* 4, c. 50, s. 8, were placed under the management of the Commissioners for the time being of his Majesty's Woods, Forests, and Land Revenues. These lands had been, for the last six years, in the possession of a bailiff to the Commissioners, who took in cattle to graze on the lands, and accounted to the Commissioners for the profits. In the year 1834, and in every year since, a rate had been duly made in the parish of Richmond, under the local act, by which the Commissioners were rated in respect of the crown lands in their management, but which rates they had always refused to pay. It appeared that there was no property of the Commissioners within the county which could be distrained for the rates.

Sir *W. W. Follett,* (with whom was *Montague Chambers,*) applied to the Court for a mandamus, commanding the Commissioners to pay the rates.—There being no property within the county, which can be distrained upon for these rates, and the magistrate's warrant of distress being of no authority out of the county, the only remedy which can be had in this case is by mandamus. In *The King* v. *The Margate Pier Company* (*a*), this point was discussed, but not settled.—[*Coleridge,* J.—Are not the lands in the possession of the crown, and, therefore, not liable to these rates? In the case of *The Attorney General* v. *Hill* (*b*), it was lately held that a royal dockyard was not liable to the land-tax.]—That case was decided rather on the particular acts of parliament, than on the general right of the crown not to pay rates and taxes.—[*Coleridge,* J.—I must be satisfied these lands are not in the occupation of the crown. It seems to me that the Commissioners are merely public officers, holding the crown property, and that they have no beneficial occupation.]—Under the local act it is unnecessary that there should be any beneficial occupation. Power is there given to rate persons who "hold" any land, and it is submitted, that these Commissioners *hold* their lands within that provision, although it is merely for the purpose of handing over the profits to the crown. The provisions of this local act give more extensive powers of rating than are given by the act of the 43d of Elizabeth, and under those provisions the Commissioners are liable.

COLERIDGE, J.—As at present advised, I do not think these parties are entitled to this mandamus.

Rule refused.

(*a*) 3 B. & Ald. 220; 2 Chit. 256. (*b*) 2 Mees. & Wels. 160.

Bail Court.

REYNOLDS *v.* ASKEW.

1. A cause being pending, it was agreed to refer it to arbitration, which was done by articles of agreement, and not by order of a judge:—*Held*, that an award made under this reference was made under the statute 9 & 10 *W.* 3, c. 15, and that a motion to set it aside on the ground of fraud in the appointment of the umpire, should be made in the term next after the award was made and published.

2. It is no excuse for not making the motion within that time, that the submission had not then been made a Rule of Court.

3. A motion subsequently made is too late, even though the facts on which the motion was made had not come to the knowledge of the party within that time.

4. A person moving to set aside an award, which is not made under the statute 9 & 10 *W.* 3, c. 15, after the time for moving for a new trial has expired, must shew *clearly* to the Court the reasons why the application is made so late.

THIS was a rule calling on the defendant to shew cause why an award should not be set aside, on the ground of fraud in the appointment of the umpire, and of partiality in his conduct. It appeared by the affidavits, that an action was pending between the parties in this Court, and that they went down to trial at the Summer Assizes, 1836, but instead of entering the cause for trial, the parties agreed to refer the matter to arbitration. A submission to arbitration was accordingly executed, in which it was agreed that the submission might be made a rule of any of the Courts. An award was made on the 11th of August following. It did not appear on the affidavits whether notice of the award was then given, but it did appear that in December the plaintiff knew the award was made and published, and that it was in favour of the defendant. Some applications were then made by the plaintiff for a copy of the award, which was given him by the beginning of January; the exact day was not stated. In a letter sent by the plaintiff to the defendant on the 3d of January, he threatened to take proceedings to set aside the award. No motion to set aside the award was made in Hilary term. The submission to arbitration was made a Rule of Court by the defendant by a rule dated on the last day of that term. It was stated, that in February the plaintiff first became acquainted with the facts, which shewed that there was fraud in the appointment of the umpire and partiality in his decision. The parties afterwards went before a judge at chambers, who stayed all proceedings for enforcing the award until the fifth day of Easter term. At the beginning of that term this rule nisi for setting aside the award was granted.

Crowder and *Barstow* now shewed cause.—This is an award made under the provisions of the statute 9 & 10 *Will.* 3, c. 15, and therefore the application for this rule was made too late. By the second section of that statute it is provided, that such an application as the present must be made before the last day of the term next after the award is made and published to the parties. Now taking it that the plaintiff was not aware of this award until the beginning of January, and that therefore it is not to be considered as made and published until that time, still this application ought to have been made in Hilary term. It is no answer to say that the submission was not made a Rule of Court until the last day of that term, as the plaintiff himself might any day have made it a Rule of Court.

Erle and *Moody*, contrà.—It must be admitted by the other side that this award was not made and published until the beginning of January; Hilary term, therefore, is the term next after; but it was impossible for the plaintiff then to make application to this Court, as the defendant had not made the submission a rule of this Court, and by the submission power was given to make it a rule of either of the Courts at Westminster. The defendant, by delaying until the last day of that term, intended to prevent, if possible, the plaintiff from making this application. The case of *In re Perring and Keymer* (*a*), is a case precisely similar to the present. That case is

(*a*) 3 Dowl. P. C. 98.

an authority to shew, that this submission not having been made a Rule of Court until so late that it was impossible by the practice of the Court to move to set the award aside in Hilary term, the present application is to be considered as having been made in that term. Another reason for allowing this application to be made in Easter term is, that it appears on these affidavits that the facts on which it is grounded did not come to the knowledge of the plaintiff until after Hilary term was passed, so that it was impossible for him to move to set aside the award on those grounds in that term.—[*Coleridge*, J.—Assuming that to be the case, still I am of opinion that I have no jurisdiction after that term expired. The parties can only proceed under the second section of the act, and that section is express, that the application must be made in the term next after the award is made and published to the parties.]—This award may be considered as not coming within the provisions of the statute 9 & 10 *Will.* 3, c. 15, and then it is in the discretion of the Court to hear this application at any time. A cause was depending in this Court between the parties, and this reference to arbitration clearly arose out of that cause.—[*Coleridge*, J.—But here the parties have not chosen to proceed under the authority of the Court, which they might have done.]—The mere fact of there having been a cause depending is sufficient to give the Court jurisdiction.—[*Coleridge*, J.—Nothing has been done by the arbitrator under a rule of this Court; how then can it be said he has proceeded under the authority of the Court? Every thing has been done under the agreement between the parties, and it is therefore a case within the statute, which by its language contemplates the reference of *a suit* under its provisions.]—Previous to that statute, the Court would recognise the reference of a cause to arbitration, and it is submitted that the preliminary step of a Rule of Court is not necessary. No case can be cited against the position, that the mere fact of a cause being depending, gives the Court jurisdiction. The case of *Rawsthorn* v. *Arnold* (*a*) shews, that the submission having been made a Rule of Court, will not of itself make this an award within the statute. The cases of *Rogers* v. *Dallimore* (*b*), and *Haywood* v. *Phillips* (*c*) shew, that in a case which is not within the statute, the Court is not limited to the term next after the making and publishing the award, although in ordinary cases they will look to the time given by the statute as a rule to guide their discretion in reviewing awards. The Court will, therefore, see whether this application was made within a reasonable time, which it is submitted, under all the circumstances, it was.

COLERIDGE, J.—I am of opinion that this application was made too late, and it is therefore unnecessary for me to go into the merits of the case. It appears that there was an action pending between the parties; in what state it was exactly does not appear, but the parties went down to trial. The cause was not entered for trial, but the articles of agreement were executed, by which the matter was referred to arbitration. That was in the Summer of 1836; the award was made on the 11th of the following August. It does not appear whether notice of the award was then given, but it does appear, that in December the party who is now seeking to set aside the award was aware that it was made and published; he was also aware that it was

(*a*) 6 Barn. & Cress. 629; 9 Dowl. & Ryl. 556.
(*b*) 6 Taunt. 111.
(*c*) 1 Will. Wol. & Dav. 1.

Bail Court.

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Humfrey shewed cause.—The case of *Barker* v. *Gleadow* (*a*), is an answer to the first part of this rule. As to the second part, that this demurrer is frivolous, it depends on whether the 1st rule of H. T. 4 *Will.* 4, applies to actions of scire facias, and it is contended, on the part of the defendant, that it does not, and that, therefore, the replication, as well as previous pleadings, ought to have been intituled according to the old practice.—He then contended that two other grounds of demurrer, which were stated, were not frivolous.

Mansel, contrà.—The statute of 3 & 4 *Will.* 4, c. 42, s. 1, under which the pleading rules of H. T. 4 *Will.* 4, were made, refers to actions at law generally, and this scire facias is merely the continuation of the original action at law, and, therefore, the rule as to the intituling of pleadings applies as in other cases.—He also contended that the other grounds of demurrer were also frivolous.

COLERIDGE, J.—The two last grounds of demurrer are clearly frivolous. As to the first, it turns on the question of whether a scire facias is to be considered within the rule of H. T. 4 *Will.* 4, as to the intituling pleadings with the day of the month and year when they are pleaded. I think that it is, and, indeed, it has been so treated by the parties throughout the cause. Actions of ejectment (*b*), and real actions (*c*), have been held certainly not to be within the rules of H. T. 4 *Will.* 4; and, on this ground, the action of ejectment is a legal fiction, in which there is but one plea, and, therefore, to hold that action to be within those rules, would be to destroy it altogether. Real actions are confined to the Court of Common Pleas only, and, therefore, are not included within those rules which apply to all the Courts. I think, also, that a scire facias is to be considered as a proceeding in the original action. This rule must, therefore, be made absolute without costs, to set aside the demurrer, the defendant having leave to amend, on payment of the costs of amendment.

Rule accordingly.

(*a*) 2 Har. & Wol. 113; 5 Dowl. P. C. 134.

(*b*) *Doe* d. *Evans* v. *Roe*, 1 Adol. & El. 11; *Doe* d. *Fry* v. *Roe*, 3 M. & Scott, 370; *Doe* d. *Ashman* v. *Roe*, 1 Bing. N. R. 253; and *Doe* d. *Gillett* v. *Roe*, 4 Tyr. 649; 1 Cr. M. & Ros. 19; 2 Dowl. P. C. 690.

(*c*) *Miller* v. *Miller*, 1 Hodges, 31; 3 Dowl. P. C. 408; 1 Scott, 387; and *Barnes* v. *Jackson*, 1 Hodges, 59; 3 Dowl. P. C. 404; 1 Scott, 525.

The KING *v.* The COMMISSIONERS of His Majesty's Woods, Forests, and Land Revenues.

Mandamus to the commissioners of woods and forests to compel them to pay poor rates for crown lands in their occupation, refused.

THIS was an application for a mandamus, on the behalf of the parish officers of Richmond. It appeared that the rates for the relief of the poor of that parish, were levied under a local act, 25 *Geo.* 3, c. 41, by which power was given to levy rates "upon all and every person and persons who do and shall inhabit, hold, use, occupy, or enjoy any land, house, shop, waterworks, stables, coach-houses, wharf, warehouses, or other building

within the said parish, or on any other person and persons who by law are chargeable and assessable for and towards the relief of the poor of the said parish, for such sum or sums of money as the said vestrymen, or any thirteen or more of them, shall order and direct." In the parish of Richmond are some lands belonging to the crown, which, by the statute 10 *Geo.* 4, c. 50, s. 8, were placed under the management of the Commissioners for the time being of his Majesty's Woods, Forests, and Land Revenues. These lands had been, for the last six years, in the possession of a bailiff to the Commissioners, who took in cattle to graze on the lands, and accounted to the Commissioners for the profits. In the year 1834, and in every year since, a rate had been duly made in the parish of Richmond, under the local act, by which the Commissioners were rated in respect of the crown lands in their management, but which rates they had always refused to pay. It appeared that there was no property of the Commissioners within the county which could be distrained for the rates.

Sir *W. W. Follett,* (with whom was *Montague Chambers,*) applied to the Court for a mandamus, commanding the Commissioners to pay the rates.—There being no property within the county, which can be distrained upon for these rates, and the magistrate's warrant of distress being of no authority out of the county, the only remedy which can be had in this case is by mandamus. In *The King* v. *The Margate Pier Company* (*a*), this point was discussed, but not settled.—[*Coleridge,* J.—Are not the lands in the possession of the crown, and, therefore, not liable to these rates? In the case of *The Attorney General* v. *Hill* (*b*), it was lately held that a royal dockyard was not liable to the land-tax.]—That case was decided rather on the particular acts of parliament, than on the general right of the crown not to pay rates and taxes.—[*Coleridge,* J.—I must be satisfied these lands are not in the occupation of the crown. It seems to me that the Commissioners are merely public officers, holding the crown property, and that they have no beneficial occupation.]—Under the local act it is unnecessary that there should be any beneficial occupation. Power is there given to rate persons who "hold" any land, and it is submitted, that these Commissioners *hold* their lands within that provision, although it is merely for the purpose of handing over the profits to the crown. The provisions of this local act give more extensive powers of rating than are given by the act of the 43d of Elizabeth, and under those provisions the Commissioners are liable.

COLERIDGE, J.—As at present advised, I do not think these parties are entitled to this mandamus.

Rule refused.

(*a*) 3 B. & Ald. 220; 2 Chit. 256. (*b*) 2 Mees. & Wels. 160.

Bail Court.

ROBINS v. GRANT.

that it is not necessary to state the date of a bill of exchange, yet that is one of the things which identifies the bill (*a*).]—The decision of the Court in the case of *Brooke* v. *Coleman* is without any qualification whatever, and is an authority to shew that this affidavit is bad.

COLERIDGE, J.—There is also a later case of *Molyneux* v. *Dorman* (*b*), but I shall take time to consider the case.

Cur. adv. vult.

COLERIDGE, J. (the same day.)—The case of *Fowell* v. *Petre* (*c*) is in point precisely. There it was held that the affidavit was bad, and that the form must be complied with. There is, first, a decision of the full Court of Exchequer in the case of *Brooke* v. *Coleman*, which is a decision without any qualification; and next, that decision has been acted on in the case of *Fowell Petre*, and I must, therefore, decide that this affidavit also is defective.

R. V. Richards.—That case is however an authority for discharging the rule on another ground, namely, that there has been delay in applying to the Court. This arrest was made on the 3d of May, and the defendant suffered more than four days to elapse before he applied to a judge at chambers. Again, the summons was dismissed on the 10th of May, and although the 22d was the first day of term, yet this rule was not obtained until the 31st. This case, therefore, is a stronger case than that of *Fowell* v. *Petre*.

J. L. Adolphus.—This is the case of a prisoner, and in cases where the liberty of a party is concerned, the Court does not require so prompt an application as in other cases. In *Sharpe* v. *Johnson* (*d*) two months had elapsed.—[*Coleridge*. J.—In that case the proceedings were a nullity, and not irregular merely.]—The defendant did apply promptly to a judge at chambers, six days only having elapsed, and it is immaterial when the application to this Court to review the decision of the judge was made.

COLERIDGE, J.—In *Fowell* v. *Petre*, the arrest was on the 26th of October, which was in vacation; the term commenced on the 2d of November. On the 5th the application was heard before *Littledale*, J., and the rule was obtained on the 14th, and that was held too late. I think, therefore, that this application also was too late. The rule is, that parties must come promptly in cases of irregularity, and that rule has been held applicable to prisoners as well as to others. This rule must therefore be discharged, but not with costs (*e*).

Rule discharged, without costs.

(*a*) *Shirley* v. *Jacobs*, 1 Hodges, 214; 3 Dowl. P. C. 101; 1 Scott, 67; *Irving* v. *Heaton*, 4 Dowl. P. C. 638.
(*b*) 3 Dowl. P. C. 662.
(*c*) 2 Har. & Wol. 379; 1 Nev. & Per. 227; 5 Dowl. P. C. 276.
(*d*) 4 Dowl. P. C. 324; 1 Hodges, 298; 2 Scott, 405; 2 Bing. N. R. 246.
(*e*) See the previous case.

SHARPE *v.* REDMAN.

1. To entitle a defendant to a rule under the Interpleader Act, it is not sufficient that it should merely be sworn that a third person is expected to sue the defendant for the same cause of action.

2. An auctioneer, who is sued by a vendor for a deposit paid him by a vendee, there being a dispute as to the property sold, is not entitled to relief, the vendee having stated that he should enforce the contract of sale.

THE plaintiff instructed the defendant, who was an auctioneer, to sell some leasehold property. A person named *Ward* bought it at a public auction for 75*l.*, and paid a deposit to the defendant. It afterwards turned out that there was a ground-rent on the property of 18*l.*, instead of 5*l.* only, as had been stated at the time of the sale. One of the conditions of sale was, that if any dispute arose, it should be referred to arbitration. *Ward* had offered to appoint an arbitrator to say what should be deducted on account of the increased ground-rent, but the plaintiff had refused to appoint another. *Ward* had stated since, that he should enforce the contract of sale. The plaintiff then commenced this action for the deposit paid by *Ward* to the defendant. A rule having been obtained on the part of the defendant under the Interpleader Act, 1 & 2 *Will.* 4, c. 58, s. 1, calling on the plaintiff and *Ward* to come in and state their claims, on an affidavit, in which it was stated that it was expected *Ward* would also sue the defendant for the deposit,

C. C. Jones appeared for the plaintiff.

S. Hughes, for *Ward*, contended that this was not a case within the act, as it appeared that *Ward* intended to enforce his contract, and not to rescind it and sue the defendant for the deposit.

Mansel, for the defendant, contended that it was sworn distinctly that *Ward* was expected to sue for the deposit, and that it was therefore clearly a case within the act, the defendant not being in fault, and being involved by the disputes of two other parties.

COLERIDGE, J.—I think that this is not a case within the act. I must look at the interest of the *defendant* who makes the application to the Court. It appears that he is in possession of a sum of money for which an action is brought, and I must see if that by right belongs to any third person who sues for it, or is expected to sue for it. I cannot see that *Ward* has given any intimation that he should sue for it, nor is it a necessary consequence of the facts that he should sue the defendant. It is necessary that something more should appear on the affidavits than the mere words of the act, that some third party "is expected to sue." *Ward* has stated that he shall enforce the *contract*; that is very different from its being expected that he should sue for this deposit. The rule must therefore be discharged, but without costs, and the defendant may have four days time to plead.

Rule discharged accordingly.

Bail Court.

KENDRICK *v.* DAVIS.

By a submission, it was agreed to refer an action and some cross claims to arbitration, the costs of the suit and of the reference to be paid by the party against whom the award was made. The arbitrator awarded, that at the time of the reference there was due by the defendant to the plaintiff a certain sum, which he directed to be paid; he also directed that the defendant should pay a certain sum for costs, on payment of which each party should execute a release of the matters referred: —*Held*, that the arbitrator had no power to make the award as to the costs, but that the award was not therefore bad, though the payment of the costs was made a condition precedent to the defendant obtaining his release.

AN action was pending between these parties, and the defendant had some cross claims against the plaintiff. It was then agreed to refer these matters to arbitration. By the agreement of reference, it was recited that disputes had arisen about a debt of 40*l.*, alleged to be due by the defendant to the plaintiff, and about another debt alleged to be due by the plaintiff to the defendant, and that an action had been commenced by the plaintiff against the defendant for the recovery of the 40*l.* in the Court of Exchequer; therefore, for the final ending of all such questions and disputes between the parties, and for the settling the amount of such demand, it was agreed to refer the said claims and demands to arbitration, and that "all costs and charges already incurred in prosecuting or defending the said suit, and of preparing these presents, and attending the said arbitration, should be borne and paid by the party against whom the decision of the said arbitrator should be made." The arbitrator awarded, "that before and at the time of the commencement of the said action, and at the time of the making of the said reference, there was and still is justly due from the said defendant to the plaintiff the sum of 19*l.* 0*s.* 1*d.* And I do award and direct that the said defendant do and shall pay the said sum of 19*l.* 0*s.* 1*d.*, to the said plaintiff; and the said plaintiff shall receive and accept such payment from the said defendant, in full satisfaction and discharge of all claims and demands of the said *Henry Kendrick* against the said *Edward Davis*, to the time of the commencement of the said action; and I do further order and direct, that the said defendant do and shall pay to the said plaintiff the sum of 32*l.* 15*s.* 2*d.*, being the costs and charges already incurred by the said plaintiff in prosecuting the said suit, and the costs of and occasioned to the said plaintiff by this reference; and that the said defendant do and shall pay to me the sum of 10*l.* 5*s.* 2*d.*, being the costs of this my award, and that if the said plaintiff shall pay the same, or any part thereof, the said defendant shall forthwith repay and reimburse the same; and I do further direct and award, that, after payment by the said defendant of the said sums of money, each party shall, if required so to do, at the request costs and charges of the other of them, but not otherwise, execute to him a good and sufficient release of and concerning all and every of the said matters so referred to me as aforesaid." It was agreed by the submission, that it might be made a Rule of this Court, which was done. A rule was then obtained to shew cause why this award should not be set aside, on the ground, 1st, That it was uncertain, as it did not finally settle the mutual claims and matters in difference between the parties; 2d, That the arbitrator had exceeded his authority in awarding costs, and in fixing the amount thereof; 3d, That the payment of those costs was improperly made a condition precedent to the defendant receiving a release; and on other grounds, which were not discussed.

Cresswell shewed cause.—It is laid down in *Watson* on Awards (*a*), that an arbitrator may award either a gross sum to be paid by a party for the costs, or else leave the amount to be settled by the taxing officer of the Court, and

(*a*) P. 133, 2d edition.

the cases of *Shepherd* v. *Brand*(*a*), and an *Anonymous* case (*b*), are referred to. Here, therefore, there has been no excess of authority in awarding the amount to be paid for costs. Granting that the arbitrator had no power at all over the costs, then that part of the award may be struck out, and it will remain a good award for the payment of 19*l.* 0*s.* 1*d.* But it is said that the award is not final; it is submitted, however, that had the award merely directed the payment of this sum of 19*l.* 0*s.* 1*d.*, without any thing more, it would have been final between the parties, and that it was unnecessary for him to award a release at all. The case of *Dunn* v. *Murray* (*c*), shews that such an award would be a bar to a future action. Having then awarded a release unnecessarily, it is immaterial what he awarded as a condition precedent to that release, as it was optional with the defendant whether he would take that release or not.

Sir *W. W. Follett*, contrà.—The passage cited from *Watson* on Awards, applies to those cases only where the costs are referred to the arbitrator; but in this case he had no power at all over the costs, which are to abide the event. It is clear, that without the award of the mutual releases, the award is not final. The submission recites, that there were cross claims between the parties; these were referred, and the arbitrator awarded, that at the time of the reference there was due by the defendant to the plaintiff the sum of 19*l.* 0*s.* 1*d.*, which he directed to be paid. That may well consist with a counter-claim being then due, and, therefore, except by the award of mutual releases, the award is not final between the parties. It seems to be conceded on the other side, that the arbitrator had not power to award the costs, and if so, then it is impossible that the award should stand for the payment of the 19*l.* 0*s.* 1*d.* only. It cannot be known whether the award of the payment of that sum by the defendant was not made by the arbitrator at the price of the mutual releases being given, and to those releases a condition precedent is attached, by which the defendant is directed to do that which it was not within the power of the arbitrator to direct. Suppose the plaintiff were now to bring an action, which the defendant resisted on the ground of it having been disposed of by this award; that defence would be a question of evidence, and then the burden of proving that it was a matter in dispute, within the scope of the reference, would lie on the defendant. That difficulty would not occur if he had the plaintiff's release, which would therefore place him in a more advantageous position.

Cur. adv. vult.

COLERIDGE, J. the next day (June 9th) gave judgment.—This was an application to set aside an award, and it arose under the following circumstances appearing on the face of the award. The instrument recited the existence of disputes concerning a debt of 40*l.* claimed by *Kendrick* from *Davis*, and a debt claimed by *Davis* from *Kendrick*, and that an action had been commenced for the recovery of the former sum; that, for the ending of all such disputes, and settling the amount of such demands, a reference of them had been agreed on; that the arbitrator was to be at liberty to set off one debt against the other, so as to ascertain the real balance; and that all costs and charges already incurred in prosecuting or defending the said suit, and of the award and

(*a*) Cas. temp. Hardwick, 53. (*b*) 1 Chit. 38. (*c*) 4 Man. & Ryl. 571.

Bail Court.

KENDRICK v. DAVIS.

reference, should be paid by the party against whom the decision should be. The arbitrator then found, that, at the times of commencing the action and making the reference, there was and is due from the defendant to the plaintiff 19*l.* 0*s.* 1*d.*, and awarded payment of that sum by the defendant, and acceptance of it by the plaintiff in full satisfaction and discharge of all claims of the plaintiff to the time of commencing the action. He further awarded, that the defendant should pay to the plaintiff the sum of 32*l.* 15*s.* 2*d.*, being the costs already incurred by the plaintiff in prosecuting the suit, and the costs of and occasioned to her by the reference; and that he should pay to himself, the arbitrator, the sum of 10*l.* 5*s.* 2*d.*, being the costs of the award; and he further awarded, that, after payment of the said sums of money, each party should execute, if required, to the other a release of and concerning all the matters so referred.

It was objected, that the arbitrator had exceeded his authority in fixing the amount of the costs, and in making the payment of the sums so fixed a condition precedent to the execution of a release.

The provision in the submission as to the costs is, in substance, that they shall abide the event of the award; the arbitrator, therefore, has no direct power over them, and he has clearly exceeded his jurisdiction in awarding that a certain sum shall be paid on that account. Two cases, indeed, were cited in support of the taxation by the arbitrator, *Shepherd* v. *Brand*, and an *Anonymous* case. Neither of them, however, upon examination, appears to apply to the circumstances of the present case. In the first it is not stated what were the terms of the reference, and, for all that appears, the arbitrators had full power over the costs: the second was a motion to review the taxation, the subject having been expressly referred to them; but, in the present case, the subject-matter is expressly withdrawn from their jurisdiction.

It was, however, insisted that this would only have the effect of avoiding the award pro tanto, and that the direction to pay 19*l.* 0*s.* 1*d.* would still be good. The general rule as to excess of jurisdiction was not disputed; but it was said, that the award of mutual releases was so inseparably connected with the vitious award as to costs, that the whole was bad, for that the defendant was entitled to such release, it being the only mode in which the award became final on all the claims referred, and yet that he was unable to insist on such release, without submitting to pay the sum so improperly fixed for the costs. It appeared to me that there was some weight in this argument; but it seems to me that I am bound by the authority of the case of *Aitcheson* v. *Cargey* (*a*), which was a case in error from the Court of King's Bench. In that case there was an award of mutual *general* releases, *upon payment* of certain specified sums, and among other things of certain costs. It was contended, that as to these the arbitrators had exceeded their jurisdiction, and it was admitted by the Court that they had; but they nevertheless affirmed the judgment of the Court below, and sustained the award for the residue.

That case is in some respects stronger than the present; for, besides the distinction between a general release, and such a release as here specified, it might perhaps here be successfully contended, that, on payment of the costs

(*a*) 2 Bing. 199; M'Clel. 367; 9 Moore, 381; 13 Price, 639.

regularly taxed, with the sum of 19*l.* 0*s.* 1*d.*, the defendant might entitle himself to the release; at all events, it is an authority which I ought not to question, and this rule must accordingly be discharged.

Rule discharged.

FEARON *v.* WHITE.

On moving for a commission to examine witnesses, it is not necessary that the names of the examiners should be stated in the affidavit.

CLEASBY moved, on the 8th of June, for a commission to examine witnesses in Scotland, on the part of the defendant, under the provisions of the statute 1 *Will.* 4, c. 22, s. 4. The affidavit on which he moved stated, that the issue in the cause was delivered on the 5th of June, and that the cause of action arose in Scotland, but it did not state the names of the examiners.

COLERIDGE, J.—I think it is not necessary that the affidavit should state the names.

Rule nisi granted.

HODD *v.* LANGBRIDGE.

An incorrect copy of the capias having been served on the defendant at the time of the arrest, it is for the plaintiff to prove, on shewing cause against a rule to discharge the defendant out of custody, that a true copy was served on the defendant.

THIS was a rule to shew cause why the defendant should not be discharged out of the custody of the sheriff of Surrey, for irregularity, with costs, on entering a common appearance. The affidavit on which the rule was granted stated, that the defendant was arrested on a certain day, and that the officer who arrested him gave him a paper-writing, which was annexed to the affidavit. That paper was the copy of the capias, which, by the Uniformity of Process Act, 2 & 3 *Will.* 4, c. 39, s. 4, it is necessary should be left with the defendant at the time of the arrest (*a*); but that copy did not contain the name of any plaintiff. The affidavit also stated, that at the time of the arrest no other copy was served on the defendant, neither had any other been served since.

Peacock shewed cause, and contended, that the rule being granted on the ground of the defect in the copy of the capias served on the defendant at the time of the arrest, the affidavit did not sufficiently identify the arrest stated, with the cause in which the affidavit was intituled. He also contended, that the Court at any rate would not make the rule absolute with costs, as the mistake was that of the sheriff's officer, and not of the plaintiff.

Heaton, contrà, was stopped by the Court.

COLERIDGE, J.—It is admitted that this is a ground for discharging the defendant out of custody. The affidavit shews quite sufficient to make out the case, and call on the plaintiff for an answer, by shewing that a true copy of the capias was served on the defendant. The rule must therefore be absolute, and with costs, as it is the duty of the plaintiff's attorney to give a cor-

(*a*) See the case of *Shearman* v. *Macknight*, *ante*, 189.

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HODD v. LANGERIDGE.

rect copy of the capias to the sheriff to deliver to the party, and I cannot presume that the sheriff has lost the copy given him, and has made out this incorrect copy.

Rule absolute, with costs.

HOOPER *v.* VESTRIS.

An affidavit of debt, stating a certain sum to be due by the defendant to the deponent "on an account stated between them," is bad.

THIS was a rule to shew cause why the bail-bond should not be delivered up to be cancelled, on a common appearance being entered, on the ground of a defect in the affidavit to hold to bail. The affidavit stated, that the defendant was indebted to the deponent for several things, "and for money found to be due to this deponent by the said *Eliza Lucy Vestris*, on an account stated between them."

W. H. Watson shewed cause.—This affidavit is supposed to be bad because it does not state that the account was stated *and settled* between them, or stated *by* them; but it is in the form settled by the judges for declarations (*a*), and it is submitted that that form is also sufficient for the affidavit of debt. It is also according to the form given in *Archbold*'s Practical Forms.

Archbold, contrà.—The form given by Mr. *Tidd* varies from the present; that form is that the account is stated *and settled*, and that is the form which has invariably been adopted. A late case occurred, as it is said, before *Williams*, J. at Chambers, where there was a similar affidavit, which he held to be bad, and discharged the defendant.

COLERIDGE, J. (after sending into the full Court).—I cannot find any case in point, but the form given by Mr. *Tidd* is an authority against the present affidavit, and I think that the principle of the case is also, and I shall therefore hold that this affidavit is bad. I have sent to consult my brothers in the other Court, and they say that they think that in some late case it was decided such an affidavit was bad. The affidavit may be all true, and yet no debt may be due between the parties (*b*).

Rule absolute.

W. H. Watson then asked for a rule to shew cause at Chambers, it being the last day of the term, why the plaintiff should not be at liberty to discontinue the action for the purpose of arresting the defendant again; but it was refused.

(*a*) Rules T. T. 1 *Will.* 4, 1 Dowl. P. C. 113.

(*b*) In *Debenham* v. *Chambers*, this decision was cited and questioned by the Court of Exchequer, 1 Mur. & Hurl. M. T. 1837; 6 Dowl. P. C. 101; and in *Balmanno* v. *May* in this Court in H. T. 1838, after taking time to consider his judgment, and after speaking to the other judges, *Patteson*, J. overruled the above case. See also *Visger* v. *Delegal*, 2 B. & Adol. 571, and *Tyler* v. *Campbell*, 3 Hodges, 79; 5 Dowl. P. C. 632, which were referred to.

The KING *v.* The Inhabitants of WITNEY.

This Court will not discharge an indictment for non-repair of a highway until after it has been seen that the repairs stand good through a winter.

THIS was a rule calling on the prosecutor to shew cause why, on a fine of 6*s.* 8*d.* being imposed on the defendants, the indictment against them for non-repair of a highway should not be discharged. The rule was granted on the certificate of two magistrates, dated on 20th of May, that the road had been put into good repair, and that it was likely so to continue.

R. V. Richards submitted, that according to the usual practice the indictment could not be discharged until after the next winter, as it was necessary to see that the repairs would stand good during the winter's wear, and that therefore the rule was premature.

Greaves, contrà, submitted that the magistrates' certificate, that the road was in good repair and likely so to continue, was sufficient proof of its state, without waiting for the winter's wear.

COLERIDGE, J.—I have already decided in two other cases this term, that this rule cannot now be granted. The practice at sessions is not to discharge such indictments until after a winter's wear, and the officer informs me that the practice is the same when indictments are removed into this Court. The certificate of the magistrates may mean that the road is likely to continue in good repair during the summer only. The rule must be discharged.

Rule discharged.

HULME *v.* ASH.

Where the copy of the capias served on a defendant at the time of his arrest varies from the form given by the act; the bail-bond must be delivered up to be cancelled, although the variance is immaterial.

THIS was a rule to shew cause why a bail-bond should not be delivered up to be cancelled, on a common appearance being entered, on the ground that the copy of the capias served on the defendant at the time of the arrest omitted the name of the defendant in one place. It was in this form; "and we hereby require the said —— to take notice, that within eight days after execution thereof on him, inclusive of the day of such execution, he should cause special bail to be put in, &c."

Addison shewed cause.—The case of *Smith* v. *Crump* (*a*) differs from the present, and cannot therefore be relied on as deciding this case, for there the omission made it ambiguous who was to enter the appearance. In this case there is no ambiguity, as the bail is to be put in within eight days after *execution on him*, which shews who is meant. It has been decided in many cases, that where a person cannot be misled by such an omission as the present, the omission will not be considered material. In the cases of *Clutterbuck* v. *Wiseman* (*b*), *Page* v. *Carew* (*c*), *Hodgkinson* v. *Hodgkinson* (*d*), *Sut-*

(*a*) 1 Dowl. P. C. 519.
(*b*) 2 Cromp. & Jerv. 213; 2 Tyr. 276.
(*c*) 1 Cromp. & Jerv. 514.
(*d*) 1 Adol. & El. 533; 3 Nev. & Man. 564; 2 Dowl. P. C. 535.

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ton v. *Burgess* (*a*), *Cooper* v. *Wheale* (*b*), *Chalkley* v. *Carter* (*c*), that principle was acted on, and it cannot be said that in this case the defendant could be misled.

Butt, contrà.—The cases of *Nichol* v. *Boyne* (*d*), *Byfield* v. *Street* (*e*), *Perring* v. *Turner* (*f*), and *Hodgkinson* v. *Hodgkinson*, were all cases where more trifling mistakes than the present were held fatal. From these cases it may be collected that the Court will not enter into the question of the mistake being material or not, or whether it is likely to mislead.

COLERIDGE, J.—According to the Uniformity of Process Act, 2 & 3 *Will.* 4, c. 39, I certainly cannot see that any distinction can be made between a material and immaterial variance, and it is not a distinction which is very creditable for the Courts to make. The only method to put an end to these disputes is to hold the rule to be strict, and that no distinction can be drawn between a material and immaterial variance. I shall therefore act on the case of *Smith* v. *Crump*, which is exactly in point, if there is no distinction between a writ of capias and of summons (*g*). The rule will therefore be absolute.

Rule absolute.

(*a*) 1 Gale, 17; 3 Dowl. P.C. 489; 1 C.M. & Ros. 770; 5 Tyr. 320.
(*b*) 1 Har. & Wol. 525; 4 Dowl. P.C. 281.
(*c*) 1 Tyr. & Gr. 210; 4 Dowl. P.C. 480.
(*d*) 10 Bing. 339; 2 Dowl. P.C. 761.
(*e*) 10 Bing. 27; 2 Dowl. P.C. 739.
(*f*) 3 Dowl. P.C. 15.
(*g*) See *Rolfe* v. *Swann*, 2 Gale, 82; 1 Mees. & Wels. 305; and *Margetson* v. *Tugghe*, 2 Har. & Wol. 85; 5 Dowl. P.C. 9.

WALLACE *v.* BROCKLEY.

1. If a person attest a cognovit as attorney for a defendant who is in custody on mesne process, and it turns out afterwards that he is not an attorney, but that the defendant was not aware of the fact, the cognovit may be set aside.
2. It is sufficient if the attorney declares verbally that he signs as attorney of the defendant, as it is not necessary that it should appear on the attestation.

THIS was a rule to shew cause why the cognovit given by the defendant, and the subsequent proceedings thereon, should not be set aside with costs. The defendant, when he gave the cognovit, was in custody on mesne process, and the attestation was in this form: "Witness *R. P. Gains*, attorney for the above-named defendant, in custody, at his request." It also appeared on the affidavits, that *Gains*, who acted as the defendant's attorney, had not taken out his certificate for above a year, but that that fact was unknown to the defendant, who believed him to be an attorney of the Court, and represented that he was his attorney when he gave the cognovit. *Gains* stated at the time that he signed as attorney for the defendant.

R. V. Richards shewed cause.—One objection made to this cognovit is, that the attestation does not comply with the Rule of Court, H. T. 2 *Will.* 4, I. 72 (*h*), as it does not state that the witness signed *as* the attorney for the defendant, and the case of *Fisher* v. *Nicholas* (*i*) is relied on.—[*Coleridge*, J.—In that case, it appeared that the defendant had neither verbally requested the attorney to act for him, nor did it appear by the attestation that he had so acted. In *Wilson* v. *Price* (*k*) the attestation, which was not quite so explicit

(*h*) 1 Dowl. P.C. 192.
(*i*) 2 Dowl. P.C. 251.
(*k*) 4 Dowl. P.C. 213.

as the present was held good; and *Parke*, B. says, that it is a sufficient compliance with the rule if the attorney makes the declaration required by the rule vivâ voce, to which Lord *Abinger*, C. B., *Bolland* and *Gurney*, Bs. concurred. I believe that there was a case in which I acted on a more literal interpretation of the rule (*a*).]—That objection not being a cause for setting aside this cognovit, it is submitted that the representation, made by the defendant to the plaintiff, that *Gains* was an attorney, when in fact he was not, must not prejudice the plaintiff, as it will be giving a defendant advantage of his own wrong. The Court of C. P. acted on that principle, and refused a rule similar to the present in the case of *Jeyes* v. *Booth* (*b*).—[*Coleridge*, J.—I do not think that if a defendant innocently represents a person to be his attorney, and it turns out afterwards that he is not an attorney, that he is therefore not to avail himself of the objection that the Rule of Court has not been complied with.]—It is submitted that it is immaterial whether the defendant was himself aware of *Gains* being an attorney.

Peacock, contrà.—The judgment of *Taunton*, J. in the case of *Walker* v. *Gardner* (*c*), shews that the Rule of Court is made for the benefit of the defendant, and that he is incapable of waiving that benefit. It therefore follows, that if the defendant believes that he has had the benefit of the rule, and it afterwards turns out he has not, that this Court will set aside the cognovit. But if the defendant has himself connived at a deception of the plaintiff, as in the case cited, then the law will not allow him to take the benefit of his own wrong.—(He was then stopped by the Court.)

COLERIDGE, J.—It is laid down in Mr. *Tidd*'s Practice (*d*), on the authority of a case of *Verge* v. *Dodd*, decided in Easter term 11 *Geo.* 4, that the attestation of the attorney who has not taken out his certificate within a year is not sufficient. Here that was the case, though there was ignorance of the fact on both sides. It may be that the plaintiff, believing the representation of the defendant, that the person present was an attorney, consented to the arrangement; still, if the person was not an attorney, and the defendant was not guilty of any fraud, I must give him the benefit of the Rule of Court. As a case has decided, that where an attorney has not taken out his certificate for more than a year, his attestation is insufficient, I am of opinion that this rule must be made absolute, but not with costs.

Rule absolute.

(*a*) The case of *Kirke* v. *Dark*, 2 Har. & Wol. 94; see also *Robinson* v. *Brooksbank*, 4 Dowl. P. C. 395.

(*b*) 1 Bos. & Pul. 97.

(*c*) 4 Barn. & Adol. 371. See also *Hutson* v. *Hutson*, 7 Term Rep. 7.

(*d*) New Practice, p. 279, 280.

FRANCE *v.* CLARKSON.

THE defendant being in custody on final process, in order to get his discharge, agreed to give a cognovit for the debt and sheriff's poundage, &c. A writ of summons was accordingly issued on the judgment, and the defendant, while in custody, gave the cognovit, but no attorney was present on his part when he executed it.

If a defendant is in custody on *final* process, and a writ of summons has issued on the judgment, it is not necessary that an attorney should be present on his behalf when he signs a cognovit.

Bail Court.

FRANCE v. CLARKSON.

F. V. Lee having obtained a rule to shew cause why this cognovit should not be delivered up to be cancelled, on the ground, amongst others, that the rule of H. T. 2 *Will.* 4, I. 72 (*a*) was not complied with, as no attorney was present when the defendant signed the cognovit.

Humfrey shewed cause, and contended that that rule applied, as appeared by its express terms, only to cases where the party was in custody on *mesne* process; and that although a writ of summons on the judgment had issued in this case, that that would not bring the case within the rule.

COLERIDGE, J. being of that opinion, and the other grounds on which the rule was moved being answered by affidavit, the rule was discharged with costs.

(*a*) 1 Dowl. P. C. 192.

LIDDEL *v.* CRANCH.

Since the Uniformity of Process Act, a plaintiff has four terms within which he may enter an appearance for the defendant.

THIS was a rule to shew cause why the appearance entered by the plaintiff for the defendant should not be set aside for irregularity with costs. The writ of summons issued on the 28th of February last, and was served on the defendant on the 1st of March, which was in Hilary vacation. No appearance was entered by the defendant, and the plaintiff entered an appearance for him, under the statute 12 *Geo.* 1, c. 29, on the 29th of May, which was in the present term. He delivered a declaration the same day.

Whateley shewed cause.—This rule is moved on the ground that the plaintiff has not so long a time to enter an appearance for the defendant, and it is contended that it should have been done either during Easter term or during the following vacation. The old rule was, that in this Court the plaintiff must enter the appearance either in the term following the return-day of the writ, or in the vacation after that term. Since the Uniformity of Process Act, 2 & 3 *Will.* 4, c. 39, there is no return of a writ of summons; and it is submitted that the Court will now allow the plaintiff to enter the appearance at any time within four terms. That was the practice of the Court of Exchequer formerly; *Cooke* v. *Allen* (*b*). The case of *Bugden* v. *Burr* (*c*) was a case in this Court under the old practice.

N. R. Clarke, contrà.—Both the cases of *Cooke* v. *Allen* and *Bugden* v. *Burr* recognise the practice of this Court previous to the passing of the Uniformity of Process Act, and it is submitted that that practice is not now altered. The eighth day after the service of the writ of summons is now to be considered as the return-day of the writ, as the defendant ought to enter an appearance before that day, and the time within which a plaintiff may enter the appearance is to be reckoned from that day.

COLERIDGE, J.—This is in effect, although not in words, an application to non-pros the plaintiff. Now the rule is, that that cannot be done until four

(*b*) 1 Cromp. & Mees. 350; 1 Dowl. P. C. 676; 3 Tyr. 379. (*c*) 10 Barn. & Cres. 457.

terms have expired, and that if the defendant wishes to expedite the plaintiff, he must rule him to go on. Here the defendant has only been served with the writ, and has not yet entered an appearance. Why should not the plaintiff be at liberty to enter an appearance for him at any time before four terms have elapsed, as the defendant himself will not appear? Why is the defendant, who has taken no step himself, to come in and ask the Court to set aside this entry of an appearance, and thus, in fact, non-pros the plaintiff? The rule must, therefore, be discharged. I do not see the least analogy between the return-day of the writ under the old practice, and the expiration of the *eight* days' time to put in bail under the new.

Rule discharged, with costs.

LOWDER *v.* LANDER.

An attorney resident in London has only four days' time for pleading in a country cause, even since the passing of the Uniformity of Process Act.

THIS was a rule to shew cause why the judgment signed in this case for want of a plea should not be set aside with costs for irregularity. A declaration, in which the venue was laid in Surrey, had been indorsed to plead in four days, and judgment was signed on the fifth day. The defendant was a practising attorney, and resident in London.

R. V. Richards shewed cause.—Where the defendant is an attorney, he has no more time for pleading in a country than in a town cause. That was decided in the case of *Mann* v. *Fletcher* (*a*). This judgment, therefore, was regularly signed.

Davison, contrà.—The only ground assigned for the opinion of the Court in the case cited is, that an attorney is by fiction of law supposed to be always present in Court. Without impugning the propriety of that decision, it is submitted, that the reason of it has become inapplicable since the Uniformity of Process Act, 2 & 3 *Will.* 4, c. 39. Formerly, when an attorney was sued as an attorney by bill, and no process was employed for the purpose of bringing him into Court, there might be some colour for the rule; but since the above act, an attorney is sued by writ of summons, like any ordinary person, and is actually required to enter an appearance. The fiction itself, therefore, having been done away with, every thing founded upon it should be discontinued, especially a rule of practice which may operate very harshly upon attornies resident in remote parts of the country.

COLERIDGE, J. (after conferring with the Master.)—Where a defendant is an attorney, and resides in London, he has only four days' time to plead even in a country cause. I think that the Uniformity of Process Act does not at all affect such a point of practice. As this rule was moved with costs, it must be discharged with costs.

Rule discharged, with costs.

(*a*) 5 T. R. 369. See also Archbold's Practice, 3d edit. p. 194, by *Chitty*; and *Brenton* v. *Lawrence*, 5 Dowl. P. C. 506.

Bail Court.

THOMPSON *v.* VAUX and another.

An affidavit to support a rule to set aside a warrant of attorney, intituled as in a cause, with the words "plaintiff" and "defendant" added to the names of the parties, is good.

PETERSDORFF shewed cause against a rule obtained by *Alfred S. Dowling*, for cancelling a warrant of attorney on which proceedings had not been commenced, and took a preliminary objection to the affidavits, that they were intituled *as in a cause*, the words "plaintiff" and "defendant" being added to the names of the parties. He submitted that they might be rightly so intituled if the rule were for the purpose of setting aside any proceedings on the warrant of attorney, but that the rule being to set aside the warrant of attorney itself, which was merely a document to authorise a person to take proceedings in a cause, they could not be so entitled correctly.

WILLIAMS, J.—I think that the affidavits are properly intituled (*a*).

The rule was afterwards made absolute with costs.

(*a*) See *Wilson* v. *Gutteridge*, 3 B. & C. 157; 4 D. & R. 736; and *Sowerby* v. *Woodroff*, 1 B. & Ald. 567.

CRAIG and others *v.* EVANS.

1. An affidavit in support of an application to stay proceedings on a bail-bond, may be intituled in the original cause.

2. A judge's order, giving further time to put in bail, is not complied with, unless the bail is not only taken, but the bail-piece is also transmitted and filed within the time.

THIS was a rule to shew cause why proceedings on a bail-bond should not be set aside, on the ground that bail had been put in in due time. The defendant was arrested on the 26th of April, and on the 3d of May he obtained a judge's order for a week's time to put in bail. That time expired on the 10th. It was collected from the affidavits, that the defendant was arrested and the bail taken at Carmarthen. On the 11th the bail-piece was received in London by the post, was filed the same day at the judge's chambers, and notice given to the plaintiff's attorney of it being lodged there. The plaintiff did not except to the bail, but took an assignment of the bail-bond, and on the 31st commenced an action on it.

Martin shewed cause.—A preliminary objection is, that the affidavits on which the rule was granted are intituled in the original cause, whereas they ought to be entitled in the action against the bail.—[*Coleridge*, J.—I do not think that an objection (*b*).]—Then the rule must be discharged on the merits, as it is clear that the bail was not put in on the 10th of May, when the time given by the judge's order expired. If the Rule of H. T. 2 *Will.* 4, I. 14 (*c*) is relied on, it is submitted that that rule is superseded by the Uniformity of Process Act, 2 & 3 *Will.* 4, c. 39, which requires bail to be put in within eight days after the arrest.

Archbold, contrà.—This bail being taken at Carmarthen, must have been taken on the 10th of May at latest, as the bail-piece was received in London

(*b*) *Leyles* v. *Chetwood*, 1 Dowl. P. C. 321; 2 Cromp. & Jerv. 332; 2 Tyr. 177; *Kelly* v. *Wrother*, 2 Chit. 109; *Stride* v. *Hill*, 1 Gale, 431; 4 Dowl. P. C. 709; 1 Mees. & Wels. 57, shew that it may be intituled either way.

(*c*) 1 Dowl. P. C. 185.

by the post on the morning of the 11th. That was a putting in bail within the time given by the judge's order, and it was not necessary that the bail-piece should have been filed and notice given within that time. This case is also within the Rule of H. T. 2 *Will.* 4, I. 14, by which it is ordered, that in the case of country bail, if the defendant resides more than forty miles off London, which this defendant appears to have done, that the bail-piece shall be transmitted and filed within fifteen days after the taking thereof. Independently, therefore, of the time given by the judge's order, this bail-piece was filed in time. That rule is not superseded by the Uniformity of Process Act, as the rule and act are quite distinct, and can well stand together.

COLERIDGE, J.—I am clear that the meaning of a judge's order for giving time to put in bail is, that within the time given not only must the bail be put in, but the bail-piece must be transmitted to London, and be filed at the judge's chambers. The proceedings on the bail-bond are therefore regular. Mr. *Archbold* relies on the Rule H. T. 2 *Will.* 4, I. 14, and says, that in this case it was filed within the fifteen days allowed by that rule. From what appears, I must take this to have been country bail. Now it is contended that that rule was superseded by the Uniformity of Process Act, but whether that be so or not, this case is not within that rule. The rule states nothing as to the *taking* of the bail, but as to the duty of *transmitting* and *filing* the bail-piece after the taking. Mr. *Archbold* contends that the defendant, by that rule, gets fifteen days beyond the time given by the judge's order, to transmit and file the bail-piece. I think that that is not so, and therefore this rule must be discharged with costs, to be paid by the bail. Four days' time may be had to put in bail to the original action.

Rule discharged accordingly.

CRIPP's Bail.

BYLES opposed these bail, which were town bail.—The first objection is, that the notice of the bail does not describe them either as housekeepers or freeholders, as required by the Rule T. T. 1 *Will.* 4, s. 2 (*a*). An *Anonymous* case reported (*b*) shews that to be a good objection. In that case the omission was held to be a cause for rejecting the bail altogether. Another objection is, that the affidavit of justification of one of the bail, given under the Rule of T. T. 1 *Will.* 4, s. 3, does not comply with the form given by the rule, as it states that the person "is not bail for any other defendant." It should have gone on "except in this action," for this person may be, consistently with that affidavit, bail for this same defendant in many other actions. The case of *Penson's* bail (*c*), shews that that objection is a ground for rejecting the bail altogether. A third objection is, that the affidavit of justification states the property of the bail to consist of household furniture, stock-in-trade, and book debts, but does not particularise the value

1. If a notice of bail does not describe them either as housekeepers or freeholders, they may be rejected.

2. In the case of town bail, if the affidavit of justification does not exactly comply with the Rule of T. T. 1 *W.* 4, the bail shall not be rejected, but the plaintiff shall have further time to inquire as to their sufficiency.

(*a*) 1 Dowl. P. C. 103.
(*b*) 1 Dowl. P. C. 160.
(*c*) 1 Har. & Wol. 663; 4 Dowl. P. C. 627.

Bail Court.
CRIPP'S Bail.

of each, which the form requires. This is another ground for rejecting the bail.

Thomas, contrà.—These are all objections which affect the question of the costs of justifying only, and are not causes for rejecting the bail. The case of *Penson's* bail is distinguishable from the present, for there it was country bail, while in this case it is town bail, and therefore the second and third objections arising on the affidavit, may be in this case cured by examination of the bail when they appear to justify. The plaintiff, by having the opportunity here to examine the bail, is placed in the same situation he would have been in had the form given by the rule been exactly complied with.

COLERIDGE, J.—I think that the affidavit of justification is insufficient. After the case of *Penson's* bail, the only way in which it can be contended that these bail must not be rejected is, by the distinction between country and town bail, as in the case of town bail they are present, and can be examined as to the matters which are omitted in the affidavit. It cannot however be said that the plaintiff is in the same situation by examining the bail themselves when they appear to justify, as he might have made inquiry from other persons beforehand, had the affidavit of justification been properly made. I think, as to the two objections to the form of the affidavit of justification, the plaintiff should have time given him to make further inquiries as to the bail; but, inasmuch as the objection to the notice of bail is exactly the same as in the *Anonymous* case cited, in which the bail were rejected altogether, these bail must in the same way be rejected also.

Bail rejected.

Thomas then obtained time to add another bail, and to justify at chambers, it being the last day of term (*a*).

(*a*) See *Carter's* Bail, *ante*, 187.

FELTHAM *v.* KING.

An exception to bail, purporting to be an exception to only one of the two bail, is good.

ON the 18th of May, bail in this case were put in and notice was given. On the 23rd the plaintiff served a notice of exception, which on the face of it purported to be an exception to only one of the two bail. The defendant treated this exception as a nullity, and did not justify the bail. The plaintiff then took an assignment of the bail-bond, and sued out a writ of summons against the bail to the sheriff. A rule having been obtained to shew cause why the assignment of the bail-bond and the proceedings against the bail should not be set aside for irregularity,

T. F. Ellis shewed cause.—There is no express authority to be found in this case. This exception to one of the bail is in effect an exception to both, but is a notice at the same time that it is intended to object to the one mentioned only. On principle there can be no objection to this form being adopted; it must have the effect of saving trouble and expense.

Hoggins, contrà.—The invariable practice is to except to *both* the bail, and the form of exception given by Mr. *Tidd*, in the Appendix to his Practice, shews that to be the correct form. If this exception should be held good, it will also be an injustice to the other bail, who is entitled to be satisfied with his fellow bail, and by this means he may have a fellow bail of whom he knows nothing whatever. The appearance, moreover, of the defendant in Court is triable by the record, and therefore supposing this exception is held to be good there will then be an entry on the record as to one bail, and as to the other, there will be an entry of the exception, instead of an entry as to both at the same time.—[*Coleridge*, J.—That will not be so; there will be no appearance of the defendant until *two* good bail are put in.]—The two persons form together but one bail, and must both therefore be excepted to. There is no authority against this rule, and the invariable practice must consequently prevail, and the rule must be made absolute.

COLERIDGE, J.—I do not think that much reliance can be placed on the language of the precedent on which Mr. *Hoggins* relies, because the words there are in the plural number. As to the inconvenience to the other bail, I do not see how that can be considered an inconvenience; the other bail has an opportunity to withdraw, and can refuse to justify with any one else. Next, as to the strict right, I think it is true, as has been argued, that an exception to one of the bail is an exception to both. One bail cannot justify without the other, except by consent of the parties (*a*), so that virtually an exception to one is an exception to both, and it is not till both come up and justify that bail is put in. This exception therefore was right, and the rule must be discharged, but not with costs.

Rule discharged without costs.

(*a*) *White*'s Bail, 2 Har. & Wol. 134; 5 Dowl. P.C. 133.

REYNOLDS' Bail.

KNOWLES opposed these bail, and objected that one of them was a proctor, which he submitted was within the meaning of the rule H. T. 2 *Will.* 4, I. 13 (*b*), that no attorney should be put in as bail.

A proctor may be bail for a defendant.

COLERIDGE, J.—I do not think a proctor is within that rule.

Bail allowed.

(*b*) 1 Dowl. P.C. 185.

STONE's Bail.

ALFRED S. DOWLING opposed these bail. The defendant, who was in custody, had petitioned for his discharge under the Insolvent Act, and had inserted in his schedule the sum of *25l.* as due to the plaintiff in the action. He had been remanded by the Insolvent Court in respect of this debt and others, as appeared by the order remanding him. The sum for which the plaintiff had detained him in this action was also *25l.* It was sub-

An Insolvent cannot be allowed to justify bail in an action against him for a debt admitted in his schedule.

Bail Court.

STONE'S Bail.

mitted, that after having admitted on his schedule that he owed the plaintiff this money, he was estopped from denying it by defending this action, and that therefore the bail could not justify.

C. C. Jones, contrà, submitted that that was no reason why the bail should not justify. He also submitted, that it did not appear that the debt due to the plaintiff, which was admitted on the schedule, was the same debt which was sought to be recovered in this action.

COLERIDGE, J.—After admitting this debt on the schedule, how can the defendant say that the plaintiff has no cause of action? The defendant is held to bail for 25*l.*, and I know of no other debt due by him to the plaintiff than the one of 25*l.* admitted in the schedule. I must act on the evidence before me, and must therefore presume that it is the same debt. After admitting the debt on the schedule he cannot justify the bail.

Bail rejected.

DELWARTE'S Bail.

1. Stock in trade cannot be considered as "effects" mentioned in an affidavit of justification of bail.

2. If bail on examination justify for different property from that mentioned in the affidavit, the defendant shall pay the costs of the justification.

THE affidavit of one of these bail which accompanied the notice of bail, according to the rule of T. T. 1 *Will.* 4, 3 (*a*) described his property as consisting of "furniture and effects in and on his house and premises at &c., of the value &c.;" on being opposed, the bail could not justify to the requisite amount on his furniture, but proved he had sufficient *stock in trade* on the premises mentioned in the affidavit.

Mansel, who opposed the bail, submitted that he could not justify for stock in trade, as coming under the term "effects" in the affidavit of justification; and that the cases of *Jackson*'s bail (*b*) and *Hemming* v. *Blake* (*c*) shewed that if this bail were allowed, the Court would order the defendant to pay the costs of opposition.

Fish, contrà, submitted that the stock in trade came under the description of "effects," and that, even if it did not, the plaintiff was not entitled to be paid the costs of opposition, as the rule of T. T. 1 *Will.* 4, 3, only ordered that the *plaintiff* should pay the costs of opposition where there was an affidavit in the form mentioned and the bail were allowed. He submitted also that the practice was altered since the decision of the cases referred to.

COLERIDGE, J.—I think that stock in trade cannot be considered to come under the term "effects." Then is this case within the rule of T. T. 1 *Will.* 4? The bail has failed to justify according to the affidavit which accompanied the notice of bail, therefore they might be rejected, and the defendant would have to pay the costs of opposing them. But the bail is admitted ex gratiâ to justify on other property, and that I think may be done on the condition of the defendant paying the costs of the opposition. The bail, in making the affi-

(*a*) 1 Dowl. P. C. 103.
(*b*) 1 Dowl. P. C. 172.
(*c*) 1 Dowl. P. C. 179.

davit, takes on himself to say that his property is that specified in the affidavit; now, suppose he abandons that property, and justified on property of a *totally different* description, the plaintiff in that case would clearly be misled in making opposition to the bail. So also here the plaintiff was misled in his opposition. The two cases cited are exactly in point, and I shall decide on them.

Bail allowed, the defendant to pay the costs of opposition.

DOE *d.* WIGGS *v.* ROE.

OGLE moved for judgment against the casual ejector, unless an appearance were entered before the end of the present term. The cause was a country cause, and the declaration was served before Easter term, with notice to appear in Easter term. He cited *Doe* v. *Roe* (*a*) and *Right* d. *Jeffery* v. *Wrong* (*b*), as directly in point.

In a country ejectment, if the notice is to appear in Easter term, a rule will be granted as of course in Trinity term, for judgment against the casual ejector.

WILLIAMS, J.—It being a country cause, the rule would have been granted in the office as a matter of course, without making a special application to the Court.

Rule granted.

(*a*) 1 Dowl. P. C. 495. (*b*) 2 Dowl. P. C. 348.

DOE *d.* SYMES *v.* ROE.

SWANN moved for judgment against the casual ejector. The affidavit stated a service on the 16th of May, which was six days before the commencement of this term. The notice at the foot of the declaration was dated on the 13th of May, 1837, and required the tenant to appear in next Easter term. The affidavit also stated, that the deponent, when he served the declaration and notice, explained it to mean that the tenant should appear in this present Trinity term. It was submitted, that the mistake in the notice was supplied by the affidavit stating the explanation that had been given.

Rule nisi granted for judgment against the casual ejector in Trinity term, where the notice required the tenant to appear in next Easter term, it having been explained to mean Trinity term.

COLERIDGE, J.—I think a rule nisi may be granted, there will then be no surprise on the party.

Rule nisi granted, which was afterwards made absolute, no cause being shewn (*c*).

(*c*) See *Doe* d. *All Souls College* v. *Roe*, 2 Har. & Wol. 138; *Doe* d. *Smithers* v. *Roe*, 4 Dowl. P. C. 374; *Doe* d. *Gore* v. *Ross*, 3 Dowl. P. C. 5; and *Doe* d. *Wilson* v. *Roe*, M. T. 1837, post.

Bail Court.

DOE *d.* FRASER *v.* ROE.

On moving for judgment against the casual ejector, a service on the "tenant in possession" must be sworn to, even though it cannot be discovered who is the tenant in possession.

N. R. CLARKE moved for judgment against the casual ejector. The affidavit stated a service on a person who said that he was the last tenant in possession, which the deponent believed to be true; it also stated a service on a person who said he had got the key of the premises; it also stated that the declaration had been nailed on the door, but did not state that the tenant in possession had been served. It appeared that it was impossible to ascertain who the tenant in possession was, and it was submitted, that under these circumstances the service was sufficient.

COLERIDGE, J.—Either there is some one in possession, or there is not. If there is, the rule is clear that it must be sworn that the tenant in possession has been served. Under particular circumstances, the practice is to swear to a service on the tenant in possession, by doing so and so. If there is no tenant in possession, the party must proceed as on a vacant possession.

Rule refused.

DOE *d.* HALL and others *v.* ROE.

Service in ejectment on two partners of a company who held the property is sufficient.

V. WILLIAMS moved for judgment against the casual ejector. The action was brought to recover a railway, which was in the possession of an Iron Company. Two of the partners had been served with the declaration and notice, which, it was submitted, was sufficient, as all the partners together were joint-tenants.

COLERIDGE, J.—I think that is sufficient.

Rule absolute (*a*).

(*a*) *S. P. Doe* d. *Tomkins* v. *Roe*, *ante*, 49.

DOE *d.* EATON *v.* ROE.

Rule nisi granted for judgment against the casual ejector, where the declaration was read over and explained to the wife of the tenant, and a copy of it marked, which copy was afterwards left with another person on the premises.

C. RAWLINSON moved for judgment against the casual ejector. Four of the tenants had been regularly served. The affidavit stated that the deponent went to serve the fifth three or four days before the term, and met the wife of the tenant, who lived on part of the premises, at a short distance from the premises. He then read over and explained the declaration and notice to her. He did not leave a copy of them with her, but marked the copy that she might know it, and said he would go to the house and see if he could find the tenant himself there, and that if he did not, he would leave that copy at the house. He then went to the house, found the tenant was not at home, and gave the copy he had marked to the tenant's daughter. The next day he called again, found the tenant out, but saw the same

daughter, who said her father had had the copy he left. He also saw the copy lying on the chimney-piece.

COLERIDGE, J.—You may take a rule nisi, which you may serve on the wife or on the premises.

Rule nisi granted.

DOE *d.* MESSER *v.* ROE.

J. BAYLEY moved for judgment against the casual ejector. There were three tenants of different parts of the premises sought to be recovered, two of whom had been properly served. The affidavit stated that the declaration and notice had been read over and served on the servant of the brother-in-law of the third tenant in possession, *Hannah Ferris*, with whom she resided. The servant said that she was too ill to be seen. The servant then took the declaration and notice up stairs, and returned in about five minutes, and said that she had delivered it to *H. Ferris*, which the deponent believed to be true.

1. Rule nisi granted for judgment against the casual ejector, where the service was on a servant at the house where the tenant lived, who was stated to be too ill to be seen.
2. A mistake in the copy of the notice served on one tenant, in the name of another tenant, is immaterial.

COLERIDGE, J.—You may take a rule nisi as to that tenant (*a*).

J. Bayley then said, that in the notice served on *H. Ferris*, the name of one of the other tenants was by mistake wrongly inserted, the notice served on that tenant having been right. He submitted, that as that tenant himself could not avail himself of the mistake, so neither could *H. Ferris* (*b*).

COLERIDGE, J.—I think it is immaterial.

Rule accordingly.

(*a*) See *Doe* d. *Tucker* v. *Roe*, 1 Har. & Wol. 671; and *Doe* d. *Hartford* v. *Roe*, 1 Har. & Wol. 352.

(*b*) In *Doe* d. *Field* v. *Roe*, 1 Har. & Wol. 516, it was held sufficient if the notice served on each tenant contained the name of that one tenant only.

The KING *v.* GAROGAN.

T. DENMAN WHATLEY moved, on the part of the Sheriffs of London, Middlesex, and Surrey, to amend the returns to several writs of capias utlagatum, by inserting the amount of the appraisement of the goods, and submitted that it was a motion which was granted of course.

Rule granted to amend the return to a writ of capias utlagatum.

COLERIDGE, J. granted the rule.

Bail Court.

NOWELL *v.* HART.

A description of the deponent in an affidavit as of the Strand, without giving the number, held sufficient.

KELLY obtained a rule to shew cause why the plaintiff should not find security for costs, on an affidavit in the form "*John Hart*, of the Strand, in the county of Middlesex, tailor, maketh oath, &c."

J. Jervis, on shewing cause, objected that this description of the deponent, as of the Strand, without giving any number, was insufficient.

COLERIDGE, J. thought it sufficient (*a*).

The rule was afterwards discharged on the merits.

(*a*) See *Wilton* v. *Chambers*, 1 Har. & Wol. 116; *Miller* v. *Miller*, 2 Scott, 117.

FRANK *v.* JAMES.

A capias directed "to the Constable of the Castle of Dover" is good.

THOMAS moved for a rule to discharge the defendant out of custody for irregularity, he having been arrested on a writ of capias directed "To the Constable of the Castle of Dover," when by the Uniformity of Process Act, 2 & 3 *Will.* 4, c. 39, Schedule No. 4, the form of direction given was, "To the Constable of Dover Castle."

COLERIDGE, J. refused the rule.

Rule refused.

MAYNARD *v.* REYNOLDS.

An affidavit of debt on a bill of exchange at three days' sight, stating that more than three days had elapsed since the defendant had received sight thereof, but not saying the day when he had had sight, is good.

PLATT moved to discharge the defendant out of custody, on account of an irregularity in the affidavit of debt. The affidavit stated that the defendant was indebted as acceptor of a bill of exchange, drawn at three days sight, and which he did not pay, "although he had had sight thereof, and although more than three days had elapsed since he was requested to pay the same." It was submitted that this statement of the non-payment, without any day being mentioned when it was presented, was insufficient.

COLERIDGE, J.—I think it is sufficient.

Rule refused (*b*).

(*b*) See *Usborne* v. *Pennell*, 4 M. & Scott, 431; *S. C.* not *S. P.* 2 Dowl. P. C. 801.

ANKER *v.* ROBINSON.

After obtaining a rule nisi for the plaintiff to find security for costs, the defendant cannot the same day have a rule nisi for judgment as in case of nonsuit.

NOTICE of trial had been given in this cause for the sittings after Hilary term, which had been countermanded.

Hoggins obtained a rule nisi for the plaintiff to find security for costs, on the ground of being resident abroad, on an affidavit which explained the cause of the delay in making the application, and the same day moved for a rule nisi for judgment as in case of nonsuit.

COLERIDGE, J.—I think that that rule is inconsistent with the former rule, and therefore cannot be granted.

Rule refused.

The KING *v.* The Governor and Directors of the Parishes of ST. ANDREW, HOLBORN, and ST. GEORGE-THE-MARTYR, LONDON.

Semble, that there must be eight days between the teste and return of a writ of mandamus.

HUMFREY moved for a rule to set aside a mandamus that had issued in this case, on the ground that there were not eight days between the teste and return of the writ. He cited *The King* v. *The Mayor of Dover* (*a*).

COLERIDGE, J., after consulting Mr. *Robinson* of the Crown Office, granted a rule nisi.

(*a*) 1 Strange, 407.

BURRELL *v.* SEATON.

Where an attorney was not living at the place of which he was described in the list at the Master's Office, and could not be found, service of a rule to pay the costs of taxation was allowed to be made on his agent.

J. JERVIS having obtained on a former day a rule nisi, calling on an attorney to shew cause why he should not pay the costs of taxation of his bill, more than one-sixth having been struck off, now applied to the Court to be allowed to serve it on the attorney's agent, as the attorney himself could not be found. On inquiry at the house in London, of which he was described in the list kept at the Master's Office, it was found that he certainly did not live there (*b*).

LITTLEDALE, J. granted the application.

(*b*) See the Rule as to the entry of the names of attornies at the Master's Office, Tidd Pr. p. 71, 72, 9th ed.

The KING *v.* The JUSTICES of the North Riding of YORKSHIRE.

King's Bench.

May 25th.

Officers of a township elected by the inhabitants, and who bear the name and exercise functions similar to those of churchwardens, are not therefore overseers of the township: and accordingly their signature is not required to a notice of an application for a bastardy order.

S. TEMPLE had obtained a rule nisi for a certiorari to the Court of Quarter Sessions of the North Riding of Yorkshire, to remove an order in bastardy, on the ground that the notice of the application for the order was not duly signed, according to the requisites of 4 & 5 *Will.* 4, c. 76, s. 73.

The order was applied for on behalf of the inhabitants of Egton, which is a township within the parish of Lyth. It contains a chapel, where marriages, baptisms, and funerals are performed, and which is repaired by rates levied in Egton. The inhabitants of Egton support their own poor, and

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elect officers called churchwardens, who exercise the usual functions of parish churchwardens. They also elect two overseers (*a*). The notice was signed by the two overseers only, and not signed by the churchwardens.

Bliss now shewed cause.—All the officers comprehended within the meaning of the word "overseers" have signed this notice. The 73d section requires the notice in question to be signed by the overseers or guardians of the parish applying. In the interpretation clause, s. 109, "overseer" is defined to mean "overseers of the poor, churchwardens, so far as they are authorized by law to act in the management or relief of the poor, or in the collection or distribution of the poor-rate, assistant overseer, or any other subordinate officer, whether paid or unpaid, in any parish or union, who shall be employed therein in carrying this act, or the laws for the relief of the poor, into execution." The officers in Egton, called churchwardens, are not within this definition, although it gives a certain extension to the meaning of the word "overseer." Many acts of parliament (*b*) speak of the duties and office of overseers as distinct from those of churchwardens; and the 43 *Eliz.* c. 2, s. 1, by which churchwardens are also constituted overseers for certain purposes, applies to parish churchwardens only. But Egton is a township, and its officers, though called churchwardens, are in truth chapelwardens. Neither the 13 & 14 *Car.* 2, nor any other statute, invests chapelwardens with the character of overseers generally, or authorizes them to interfere in matters of bastardy. By 6 *Geo.* 2, c. 31, any single overseer is empowered to make the application for an order of maintenance; and there is no legislative provision which creates the necessity for the interference of these chapelwardens on the occasion of such an application. *Rex* v. *Nantwich* (*c*) decided that neither the churchwardens of a parish containing a township, nor the chapelwardens of a chapel within that township, have any authority to interfere in the management of the poor of such township (*d*).

S. Temple, contrà.—Although Egton is, speaking literally, a township, it is still in the nature of a parish, of which it possesses nearly all the characteristics. Its chapel also is something more than a chapel in the strict sense of the word, since marriages and all the ordinary offices of a church are performed there. The statute of *Elizabeth*, therefore, applies; and under that statute the churchwardens of Egton are constituted overseers. It is true that statute speaks of parishes only, but its application was obviously not intended to be restricted to them, as appears from the language of many subsequent statutes, which speak of the churchwardens of parishes, *townships, or places*, as possessing the character of overseers. In *Rex* v. *Nantwich*, *Bayley*, J. observes, that the legislature have contemplated the application of the word "churchwardens" to townships as well as to parishes. *Rex* v. *Nantwich* differs altogether from the present case. It did not there appear that there were any churchwardens or chapelwardens of the township; and there was

(*a*) There is also an assistant overseer, who had not signed the notice, but this fact did not appear upon the affidavits in support of the rule. The Court, therefore, declined entering into the consideration as to whether it was necessary for him to sign. The objection, that he had not signed, was taken at sessions.

(*b*) 17 *G.* 3, c. 38; 56 *G.* 3, c. 129; 2 *W.* 4, c. 45, (the Reform Act,) 5 & 6 *W.* 4, c. 76, (the Municipal Corporation Act.)

(*c*) 16 East, 228.

(*d*) Many other points were raised, but as the Court decided upon one only, the others have been omitted.

nothing in the case which called for a decision of the point now raised. If these churchwardens are to be considered as on the same footing with other churchwardens, then the interpretation clause of the new act will apply. The meaning of the clause is, that no distinction is to exist between the churchwardens and overseers as regards the management of the poor. The notice in question, therefore, not having been signed by the churchwardens, is invalid, and the sessions had no authority to entertain the application.

Lord DENMAN, C. J.—Of the numerous answers given by Mr. *Bliss*, one is conclusive, viz. that not only the majority, but all of the overseers have signed this notice. The 43 *Eliz.* applied to parishes only. Then the statute 13 & 14 *Car.* 2, c. 12, s. 21, in order to avoid the inconveniences resulting from the extent of some large parishes, authorised the appointment of overseers for townships and villages, but did not make any provision for the appointment within them of churchwardens, or any such officer. Several other statutes follow, not very nicely worded, from the language of which it would seem that the legislature understood the statute of *Charles* to have authorised the appointment of churchwardens also, and that they were to exercise the functions of overseers. I am not aware that any statute assigned them such functions, and the mere opinion of the legislature is not sufficient to call a new set of officers into existence. In many cases, moreover, it would be extremely difficult to ascertain the precise boundaries of a chapelry; and convenience is every way better consulted by holding that the statute of *Charles* 2, at all events, did not contemplate the existence of any such officers as churchwardens of a township. This is not inconsistent with the decision in *Rex* v. *Nantwich* (*a*). *Bayley*, J. there observes, that though it may be inaccurate to apply the word "churchwardens" to a township, "still if there were a chapel within it, the legislature might think the word not inapplicable. The act probably meant, that if there were persons within a township exercising a similar function to that of churchwardens, they should join, &c." This is a mere expression of his opinion as to the possible intention of the legislature as to a point which was not at all nccessary to be determined in that case.

LITTLEDALE, J.—I am of the same opinion. Egton is not a parish, and the statute of *Eliz.* applies to parishes only. The statute of *Charles* 2 has no provision for the election of churchwardens or chapelwardens for townships at all. It is true that the 17 *Geo.* 2, c. 38, s. 1, and some other statutes, speak of the churchwardens and overseers of the poor of any parish, township, or place. But these words may mean, reddendo singula singulis, the churchwardens and overseers of a parish, and the overseers of a township or place maintaining its own poor. Whether that be so or not, the use of such words cannot operate so as to alter the direct provisions of previous statutes.

PATTESON, J.—I am also of the same opinion. The question arises upon s. 73 of 4 & 5 *Will.* 4, c. 76. I wish to be understood as not giving any opinion as to the necessity for all the overseers to join in signing the notice under consideration. A similar point has been already before the Court (*b*);

(*a*) 16 East, 228. (*b*) *Rex* v. *Justices of Derbyshire*, *ante*, 248.

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but in this case it is not necessary to determine that point, because all the overseers appear in fact to have joined. The chapelwardens can only be overseers of the township in cases where the limits of the chapelry and the township precisely coincide. It is admitted that there is no direct decision determining that these officers are overseers. But it is contended that it is to be implied that they are so, from the 8 & 9 *Will.* 3, c. 30, and other statutes, which speak of the churchwardens and overseers of any parish or place. However, there is nothing to shew that in that act the legislature intended to apply the words to townships. It rather looks as if they contemplated the existence of churchwardens for some place, not comprehending the whole parish; and if such a meaning can be picked out of any other act, then, as to the provisions of that act, the construction may be correct. Still there is nothing to lead us to apply such a construction to the statute of *Eliz.* In this case, therefore, all the persons that are required to join have joined.

Rule discharged.

The KING *v.* The Inhabitants of ARDLEIGH.

May 27th.

By indentures of lease and release, a pauper conveyed certain freehold lands to trustees, upon trust to sell, and before the sale to collect the rents &c., and *covenanted, upon request, to surrender certain copyhold lands* to them or their vendee, and, until such surrender, to stand seised of the copyhold lands in trust for them; and that the said trustees, after the surrender, should stand seised in trust to sell, and after the sale should hold the proceeds in trust to pay *B.*'s debts, and hand over the surplus to him:—*Held*, that after the execution of the indentures, the pauper, by residence for forty days in the parish where the copyhold estate lay, though not upon the estate itself, gained a settlement.

ON appeal against an order of two justices, dated 5th December, 1835, whereby *Thomas Beckey* and his five children were removed from the parish of Dedham to the parish of Ardleigh, both in the county of Essex, the sessions confirmed the order, subject to the opinion of this Court on the following case:—The pauper, *Thomas Beckey*, was, for many years previous and up to the year 1832, seised and possessed of freehold and copyhold estates, situate in the parishes of Ardleigh, Langham, and Dedham, in the county of Essex, which he derived as devisee in fee under the will of his father, and to which copyhold part thereof in the said parish of Dedham, he was in December 1821 admitted at a general court baron then holden for the manor of Overhall and Netherhall, in Dedham aforesaid, to hold to him, his heirs and assigns, for ever.

The pauper received the rents of the said premises, from the time of his father's death, down to January, 1832.

At the time of his father's death, and from thence until the 17th April, 1832, the pauper resided at Ardleigh. On the 17th April, 1832, he went to reside in Dedham, where he continued to reside from that time down to the time of the hearing of the appeal: he did not occupy the said copyhold premises, but resided during the whole time on other premises in Dedham.

By indentures of lease and release and assignment, dated 10th and 11th January, 1832, the said indenture of release and assignment being made between the pauper of the one part, and *Priscilla Abrey*, widow, *Joseph Osborne*, merchant, and *Samuel Abrey*, farmer, of the other part, (and executed by the pauper on the day of the date thereof,) reciting that the pauper was seised and possessed of certain freehold and copyhold estates in the several parishes of Ardleigh, Langham, and Dedham, in the said county of Essex, and was also possessed of certain stock, effects, and debts, and that, to the intent to enable him to pay his creditors, he had resolved to convey and assure all his freehold messuages, lands, tenements, and hereditaments, and to covenant to surrender and assure all his copyhold messuages, lands,

tenements, and hereditaments, unto and to the use of the said *P. A.*, *J. O.*, and *S. A.*, their heirs and assigns, and to assign his stock, effects, and debts unto the said *P. A.*, *J. O.*, and *S. A.*, and their executors, upon the trusts thereinafter mentioned; it was witnessed, that to the intent to enable the said pauper to provide for the demands of his several creditors, and in pursuance of the said agreement, and for the nominal considerations therein mentioned, he the said pauper, by virtue of all powers and authorities him enabling thereto, directed, limited, and appointed, and also granted, bargained, sold, aliened, and released unto the said *P. A.*, *J. O.*, and *S. A.*, in their actual possession there being, by virtue of the bargain and sale for a year therein mentioned, all the freehold messuages, lands, tenements, and hereditaments of him the said pauper, situate, lying, and being in the several parishes of Ardleigh, Langham, and Dedham aforesaid, or in any parish or place adjoining thereto, as he the said pauper was at law or in equity seised of or entitled to, for any estate of freehold and inheritance in possession, reversion, remainder or expectancy, and the reversion &c., and all the estate &c., together with all deeds &c; to hold unto and to the use of the said *P. A.*, *J. O.*, and *S. A.*, their heirs &c., upon trust that they the said trustees should sell the same by public auction or private contract, in one or more lot or lots, unto any person or persons whomsoever, for the best price that could be reasonably obtained for the same, and should make and execute all such contracts, conveyances, assurances, acts, matters, and things, as should be requisite or expedient for or towards making or perfecting such sale or sales, and should from time to time collect and receive the rents, issues, and profits of the said freehold premises, or of such part thereof as for the time being should not be sold under the trusts aforesaid. And it was further witnessed, that for the considerations therein aforesaid, he the said pauper, for himself, his heirs &c., did covenant, promise, and agree, to and with the said *P. A.*, *J. O.*, and *S. A.*, their heirs &c., that he the said pauper, or his heirs, should and would, upon request made by them the said *P. A.*, *J. O.*, and *S. A.*, or either of them, their or either of their heirs &c., well and effectually surrender, according to the custom of the respective manors of which they were holden, all and every the copyhold or customary messuages, lands, tenements, and hereditaments of him the said pauper, situate in the several parishes of Ardleigh, Langham, and Dedham aforesaid, and holden of the several manors of Langham Hall, Bovell's Hall, Shaws, Dedham Hall, Overhall, and Netherhall, or of some other manor or manors in Great Britain, and the reversion and reversions, remainder and remainders, yearly and other rents, issues, and profits thereof; and all the estate, right, title, interest, inheritance, use, trust, property, possession, benefit, claim, and demand whatsoever, both at law and in equity, of him the said pauper, of, in, to, or out of the said hereditaments and premises, to the only use and behoof of the said *P. A.*, *J. O.*, and *S. A.*, their heirs and assigns, or as they, or the survivors or survivor of them, his heirs or assigns, should order, direct, and appoint, or to any purchaser or purchasers under the trust therein declared of the same; and that in the meantime, and until such surrender or surrenders should be made, and the said *P. A.*, *J. O.*, and *S. A.*, their heirs or assigns, or such other person or persons as aforesaid, should be admitted under or by virtue of the same surrender or surrenders, he the said pauper and his heirs should stand and be

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seised and possessed of the said copyhold or customary hereditaments and premises, and every part thereof, with the appurtenances, in trust for the said *P. A.*, *J. O.*, and *S. A.*, their heirs and assigns; and it was thereby declared and agreed, that the said *P. A.*, *J. O.*, and *S. A.*, their heirs and assigns, should thenceforth stand possessed of and interested in the said copyhold or customary messuages, lands, tenements, and hereditaments, and every part thereof, upon trust to sell and dispose of the same in the same manner, and with the same powers and authorities as were thereinbefore declared of and concerning the aforesaid freehold hereditaments and premises, with a declaration, that the person or persons who should pay unto the said trustees any purchase-money or moneys, rents, issues, or profits, of or arising from the aforesaid freehold or copyhold messuages, lands, tenements, hereditaments, and premises, or any of them, or any part thereof, should not be obliged to see to the application of, and should not be chargeable for the misapplication of the same, or any part thereof; and that the receipts of the said trustees for the same should be sufficient discharges; and it was also witnessed, that for the considerations in the said indenture aforesaid, the said pauper assigned to the said *P. A.*, *J. O.*, and *S. A.*, their executors, administrators, and assigns, all the household furniture, stock, effects, and debts, and all other the personal estate of him the said pauper; to hold to the said *P. A.*, *J. O.*, and *S. A.*, their executors and administrators, upon trust to sell, collect, get in, and receive the same, in manner in the now reciting indenture expressed.

And it was by the said indenture declared and agreed by and between the said parties thereto, that the said *P. A.*, *J. O.*, and *S. A.*, their heirs &c., should stand and be possessed of and interested in the monies to arise and be received by virtue of or under the sales thereinbefore authorised to be made, or to be collected and gotten in by the ways and means therein aforesaid, or otherwise to arise from or in respect of the premises thereby granted and released, covenanted to be surrendered and assigned, or expressed or intended so to be, upon and for the intents and purposes thereinafter declared (that is to say); upon trust therewith and thereout, in the first place, to pay the costs and charges in the said indenture expressed; and upon further trust, to pay pari passu, and without any preference or priority, unto the several creditors of the said pauper, the amount of their respective debts; and, if there should be any residue or surplus, upon trust to pay the same unto the said pauper, his executors, administrators and assigns.

The said indenture contained a declaration, that the trustees should manage the farming business &c. of the said pauper until the aforesaid sales should be made and completed, in such manner as they should deem most fit for the benefit and interest of the estate of the said pauper.

By deed-poll dated the 18th January, 1832, after reciting the trusts of the said indenture of release of the 11th January, 1832, as hereinbefore set forth, it was witnessed, that each and every the persons whose hands and seals were affixed thereto, did covenant and agree with the said pauper, that they would accept and take the provision made by the said indenture of release of the 11th of January then instant, in full discharge and satisfaction of their several demands, and upon receipt thereof execute such releases and acquittances as might be necessary for releasing the said pauper from all claims and demands in respect thereof; and also that they would not arrest

or prosecute him for or in respect of the same, with a proviso, that if the said trustees should be prevented carrying the trusts of the said indenture of the 11th of January into effect, then the said creditors should be at liberty to proceed for recovery of their respective debts in the same manner as if they had not executed the said deed-poll.

On the 2d October, 1832, the said pauper, in consideration of the sum of 50*l.* in the surrender stated to be paid to him by one *William Downes*, (who had verbally agreed to purchase the said premises on the 11th May preceding) out of Court, surrendered, according to the custom of the said manor of Overhall and Netherhall, the said copyhold cottage and piece of land situate in Dedham aforesaid, and holden of the said manor of Overhall and Netherhall, to the use of the aforesaid *William Downes*, who was admitted thereto on the 20th November, 1832, to hold to him, his heirs and assigns.

Under the above circumstances, the question for the opinion of the Court is, whether, after the execution by the pauper of the said indentures of the 10th and 11th January, 1832, and of the deed of assent by the creditors of the 18th of January, 1832, and from thence down to the time of the admission of the said *William Downes* to the said copyhold premises in Dedham, or down to the time of the said surrender thereof to him, or during the period of any forty days after the 17th of April, 1832, he the pauper continued to have an estate or interest in the said copyhold premises in Dedham, sufficient to confer a settlement upon him, and whether the pauper gained such settlement by his residence in the said parish of Dedham during the period and in manner as hereinbefore stated.

If the Court shall be of opinion that the pauper had an estate or interest sufficient to confer a settlement, then the order of sessions is to be reversed, and the order of removal to be quashed; otherwise the order of sessions to be confirmed.

Thesiger and *A. S. Dowling*, in support of the order of sessions.—The question is, whether the pauper had such an interest in, or was so connected with this copyhold property, after the execution of the deed, as to be irremoveable. The covenant to surrender gave the intended trustees an equitable interest, and so wholly divested the pauper of it, that if they had assigned, the lord would have been bound to admit their assignee. The pauper himself, therefore, was a bare legal trustee, neither managing nor resident upon the property. No case can be found where such a trustee has been held to gain a settlement. The pauper had no such interest as a guardian in socage, who has a right to reside, *Rex* v. *Oakley* (*a*); or as an executor or administrator, who moreover are bound to reside, for the purpose of managing the property. A mortgagee, although possessed of the legal estate, does not acquire a settlement, unless he has resided *on* the property. It may be said, that the pauper has an interest in the property to the extent of the surplus, if any, payable to him after the discharge of his debts. But in *Rex* v. *St. Michael's, Bath* (*b*), Lord *Mansfield*, C. J. thought a chance of that kind of little importance, and there is nothing to shew the adequacy of this estate to

(*a*) 10 East, 491. A natural guardian has no such right; *Rex* v. *Sherrington*, 3 B. & Ad. 714.

(*b*) Doug. 630.

the payment of the debts. In *Rex* v. *Holme East Waver Quarter* (*a*), the pauper resided on the property, with the permission of her trustee, and was entitled to the whole beneficial interest in it for life. In *Rex* v. *Edington* (*b*), the conveying parties always continued in possession, and the conveyance was considered to be equivalent to a mortgage, and nothing more. Where the pauper has virtually no interest, or one merely doubtful and contingent, the Courts have agreed that a settlement would not be gained even by residence; *Rex* v. *Cregrina* (*c*), *Rex* v. *Tarrant Launceston* (*d*).

Ryland, and *C. R. Turner*, contrà—The question is, whether the possession of a legal estate is sufficient to confer a settlement; because the deed shews that the pauper was never divested of the legal estate. No one but he could demise or distrain, and there can be no doubt but that a legal, and also a clear equitable estate, is sufficient. Where the Courts have decided that no settlement was gained, there had been an absolute conveyance, or only a doubtful equity; *Rex* v. *Geddington* (*e*). In *Rex* v. *St. Michael's, Bath*, there was fraud, and that was much relied on by the Court. *Rex* v. *Cregrina* was decided, on the ground that the pauper possessed neither an equitable nor a legal estate. *Rex* v. *Houghton-le-Spring* (*f*) has decided, that neither occupation, nor a residence on the property, is necessary, and that a residence in the parish is sufficient. But *Rex* v. *Dorstone* (*g*) is decisive of the question. There the pauper had not the equitable interest, for he had contracted to sell, and the premises were in the occupation of another; yet it was held, that by a residence of forty days in the same parish, a settlement was conferred.

Lord DENMAN, C. J.—As the legal estate was still in the pauper, I am of opinion that he was not removeable. I also think that a residence upon the property itself was not necessary. We do not know that the pauper ever would have been called upon to surrender his copyhold lands to the trustees, for it is quite consistent with the circumstances of the case that sufficient funds were procured from other sources; and in this event he certainly never would be called upon to make the surrender. In order to decide, we have only to ascertain that, at the time of making the order of the justices, he was residing in a parish where the estate lay to which he was legally entitled.

LITTLEDALE, J.—I am of the same opinion. The pauper appears certainly to have been possessed of the legal estate, which is quite sufficient to render him irremoveable. Besides, the equitable estate was held for his benefit; his debts were to be discharged by it, and the surplus to be paid to himself. It is laid down in Nolan, p. 91, that a party, in order to gain a settlement by estate, must either have the legal estate or the equitable estate in possession. It is quite clear that the pauper in this case had the legal estate. Had an action of ejectment been brought for the property, he alone could have been the lessor.

PATTESON, J.—In principle this case exactly resembles *Rex* v. *Dorstone*.

(*a*) 16 East, 127.
(*b*) 1 East, 288.
(*c*) 2 Ad. & El. 536; 1 Har. & Wol. 53.
(*d*) 3 East, 226.
(*e*) 2 B. & C. 129.
(*f*) 1 East, 247.
(*g*) 1 East, 296.

In that case there was an agreement to sell; in this, to surrender to trustees to sell. In that case also the pauper did not reside on the property, and he was not held to be thereby precluded from gaining a settlement. The circumstance of non-residence is immaterial in this case. It could only be important as raising an inference that the pauper was in possession and occupation of the property. But where a party has the legal title, the authorities go to shew that possession and occupation are not also necessary. Besides, the clause in this deed, vesting the management of the pauper's farming business in the trustees, is not necessarily applicable to these copyhold lands. In *Rex* v. *Cregrina*, the Court went on the ground that the pauper had no interest, either legal or equitable.

Order of Sessions quashed.

DOE *d.* PERRY *v.* NEWTON and Wife.

Nov. 2. (*a*)

Where the genuineness of a party's handwriting is disputed, the jury may compare the document in question with other documents in the genuine handwriting of the party, provided they are in evidence for other purposes in the cause. But no document may be given in evidence for the sole purpose of such comparison, unless the disputed handwriting is ancient.

EJECTMENT tried before *Coleridge*, J. at the Summer Assizes at Carlisle 1836. The question in issue was the genuineness of a will, on which the defendant relied. The persons whose names appeared as attesting witnesses were dead. The defendant called witnesses to prove their handwriting and the handwriting of the testator. The counsel for the plaintiff (who undertook to prove that the signatures of the testator and of the attesting witnesses were forgeries) in the course of cross-examination put several letters purporting to have been written by the supposed testator and attesting witnesses, into the hands of the witnesses for the defendant, and they admitted that those letters were, in their opinion, written by the parties by whom they purported to be written. He afterwards, on the part of the plaintiff, called witnesses who stated their belief that the signatures to the will were not in the handwriting of the supposed testator and attesting witnesses. He then proposed to give in evidence the beforementioned letters, in order that the jury might institute a comparison between them and the disputed signatures. The learned judge refused to receive the evidence. Verdict for the defendants.

Alexander now moved for a new trial, on the ground (among others) that this evidence ought to have been received. It must be admitted that a *witness* cannot prove the handwriting of a party by comparison of the disputed writing with other writing established to be his. But the jury are not precluded from doing so, *Griffith* v. *Williams* (*b*), *Solita* v. *Yarrow* (*c*). The documents in those cases, it is true, were in evidence for other purposes. But that can make no difference in principle; and in *Allesbrook* v. *Roach* (*d*), *documents not in the cause* were permitted by Lord *Kenyon* to be exhibited to the jury, for the purpose of comparison with the disputed documents. An objection was taken to its being done, and his lordship, in overruling it, expressed a strong opinion in favour of the practice.

Two grounds appear to have been relied on in opposition to it. One that

(*a*) This case was argued and determined in Michaelmas Term last, but has been inserted here from its connection with the following case.

(*b*) 1 C. & J. 47.
(*c*) 1 M. & R. 133.
(*d*) 1 Esp. 351.

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juries may consist of illiterate persons, incompetent to institute such a comparison. The other, that the writings exhibited for the purpose of comparison may have been unfairly selected.

The first objection can scarcely be said to exist at the present day, and never could have had much weight; because if the jury were unable to read, the evidence would simply become unavailing.

As to the second, it equally applies to the case of ancient writings in issues depending, on the genuineness of which, comparison is admitted to be a legitimate mode of proof.

Lord DENMAN, C. J.—With respect to the question whether the letters were admissible, I think we ought to raise no doubts whatever on the subject. *Griffiths* v. *Williams* (*a*) was thought to go a long way. In that case the fact was, that the documents were already in evidence in the case. It seems to me therefore, that the ground for there admitting the comparison, was the impossibility to act otherwise. The jury must and will compare documents which are already before them; it is better therefore that the Court should direct their attention, and give them advice, than that they should form their opinion without assistance. I own it is not easy to reconcile this with Lord *Kenyon*'s decision in *Allesbrook* v. *Roach* (*b*). But *Griffiths* v. *Williams*, which certainly has gone as far as we ought to go, stops short of that case. I think it safer not to allow a comparison of handwriting by the jury in any case where it can be excluded, especially when I consider that we are laying down a rule of evidence applicable to criminal as well as civil cases.

PATTESON, J.—I always understood *Griffiths* v. *Williams* was a case where the documents were already in the cause, and therefore it was impossible to exclude comparison. A question similar to the present arose before me at Gloucester, and I acted on the principle now laid down, and refused to admit the evidence. I think the case before Lord *Kenyon* cannot be supported. I think that he went beyond the law, and it would be extremely dangerous to establish a practice in consonance with such a decision.

WILLIAMS, J.—Is it well ascertained that the facts in the nisi prius case are correctly stated? Nothing seems to have been done upon it ever since. It has never been acted on, nor referred to. I own I doubt whether Lord *Kenyon*, so correct in the law of evidence as he was, came to any such conclusion as is there reported. However, I feel that it is our duty rather to curtail as much as possible the introduction of evidence of such a nature, than in any way to extend it. We know how often the handwriting of the same individual varies. A party ought not to have the power of misleading a jury, by selecting such documents only as he pleases for that express purpose.

The case in the Exchequer may be supported, for the reasons given. No doubt juries will compare the handwriting of documents actually before them. And it is better that they should do that under the guidance of the Court than incidentally, and in a corner.

COLERIDGE, J.—I am of the same opinion. As to the instance referred to in the case of ancient handwriting, I always considered that an exception,

(*a*) 1 Cro. & J. 47. (*b*) 1 Esp. 351.

like other exceptions, by reason of the necessity of the case. Such writing also is less open than modern writing to the danger of being forged.

Another very strong objection is created to my mind, by the great number of issues that must be tried if this kind of evidence were admitted. Where the documents are already in evidence they must be looked to. But the admission of others than those would also be attended with great unfairness towards the opposite side. There would be no means of knowing what documents were to be produced, of course therefore no preparation could be made to contest or question them.

Lord DENMAN, C. J.—The last observation of my brother *Coleridge* strikes me very strongly, because the contents also of documents produced, ostensibly for the purpose of comparison, might be of such a nature as to influence the jury in other matters in the cause.

Rule refused (*a*).

(*a*) See the following case.

DOE *d.* MUDD *v.* SUCKERMORE.

June 8th.

EJECTMENT tried before *Vaughan*, J. at the Suffolk Spring Assizes, 1835, when a verdict was found for the defendant.

A person was called to prove his signature as attesting witness to a will. Upon cross-examination he admitted that several signatures which were shewn to him, and which were not in evidence for other purposes in the cause, were his. To disprove the signature to the will, an inspector at the Bank of England was called, who stated, that previous to the trial he had examined and become familiar with the admitted signatures, but did not know them to be written by the witness till he had heard him say so at the trial. He was then asked whether in his opinion the signature to the will was a genuine, or an imitated signature:—*Held*, by Lord *Denman*, C. J. and *Williams*, J., that such evidence was admissible: by *Patteson* and *Coleridge*, Js. that it was not.

Storks, Serjt. having obtained a rule nisi for a new trial, on the ground that certain evidence was improperly rejected,

Kelly (in Michaelmas term) shewed cause.

Storks, Serjt. and *Byles* were heard in support of the rule (*a*).

Cur. adv. vult.

On this day, the Court being divided in opinion, their lordships delivered their judgments seriatim.

COLERIDGE, J.—This was a motion for a new trial, on the ground that evidence had been improperly rejected by my brother *Vaughan*, under the following circumstances. The question in the case was, the due execution of a will, and the three attesting witnesses were called. It was supposed that one of them, *Stribling*, was deceived in swearing to his own attestation; and that although he had attested a will for the testator, the document produced was not that will but a forgery, and that the attestation was in truth a counterfeit. Upon cross-examination, two signatures, purporting to be his, and to have been subscribed to depositions (*b*) made by him in proceedings relating to the same will in another Court, and also sixteen or eighteen signatures, apparently his, pasted on a sheet of pasteboard, were shewn to him, and he said he believed they were all of his handwriting. At the time he gave this evidence, another witness was in Court, and the cause lasting to the second day, was called. He had never seen *Stribling* write, nor had any

(*a*) The facts of the case, the arguments, and the authorities on both sides, appear fully in the judgment of the Court.

(*b*) These depositions were not read in the present cause.

other means of acquiring a knowledge of the character of his handwriting, but from an examination of the signatures so produced. This he had made on the first day, and from this he stated, that he thought he had acquired a knowledge of the character of his handwriting, and he was asked whether he believed the attestation to the will to be the handwriting of *Stribling*. This was objected to, and on argument determined to be inadmissible. In my opinion, after much consideration, the evidence was properly rejected.

The rule as to the proof of handwriting, where the witness has not seen the party write the document in question, may be stated generally thus: either the witness has seen the party write on some former occasion, or he has corresponded with him, and transactions have taken place between them upon the faith that letters, purporting to have been written or signed by him, have been so written or signed. On either supposition, the witness is supposed to have received into his mind an impression, not so much of the manner in which the writer has formed the letters in the particular instances, as of the general character of his handwriting; and he is called on to speak as to the writing in question by a reference to the standard so formed in his mind. It is obvious that the weight of this evidence may vary in every conceivable degree; but the principle appears to be sound both in regard to the test of genuineness, and the acquisition of the means of applying it. The test of genuineness ought to be the resemblance, not to the formation of the letters in some other specimen or specimens, but to the general character of writing, which is impressed on it, as the involuntary and unconscious result of constitution, habit, or other permanent cause, and is therefore itself permanent; and we best acquire a knowledge of this character by seeing the individual write at times when his manner of writing is not in question, or by engaging with him in correspondence, either supposition giving reason to believe that he writes at the time, not constrainedly, but in his natural manner.

Upon these grounds directly, as I conceive, although not on these alone, our law has not, during a long course of years, permitted handwriting to be proved by the immediate comparison by a witness of the paper in dispute with some other specimen proved to have been written by the supposed writer of the first. It is familiar to lawyers that many attempts have been made to introduce this mode of proof according to the practice of the civil and ecclesiastical law; and a text-writer, to whose opinions I shall always pay the greatest respect, (Mr. *Starkie*, I mean,) has given this mode of proof the sanction of his authority, as preferable on principle to our own (*a*); but after some uncertainty of decision, the attempts have finally failed. *Rex* v. *Cator* (*b*), though a nisi prius decision, brings this matter very fully under review, and to the extent at least of what it rejected, has always since been considered as laying down the rule correctly. In my humble judgment that ought not to be departed from. Assuming that no dispute exists as to the genuineness of the standard, or the fairness with which it has been selected, such a comparison leads to no inference as to the general character of the handwriting; the two specimens may be much alike, or very different, yet in the former case they may proceed from different hands, in the latter from the same. But if the points which I have just supposed to be conceded be brought into question, other and most serious objections arise to this mode of proof. If

(*a*) 2 Stark. 375, 2d edit. (*b*) 4 Esp. 117.

the genuineness be disputed, a collateral issue is raised, and that upon every paper used as a standard; an issue, too, in which the proof may be exactly of the same nature as that used in the principle cause, namely, mere comparison, with the additional disadvantages, that the former standard is not produced, and that the opposing party can avail himself of no counter proof. It is easy to see, too, as has been well observed by Mr. *Starkie*, that this inquiry might lead to an endless series of issues, each more unsatisfactory than the preceding. If the fairness with which the standard has been selected be disputed, this again must lead to a collateral inquiry, in which the parties meet on unequal terms if no notice be given, (and none is required by our law,) and which must tend to distract the jury if notice be given, and the discussion on the circumstances under which each specimen was written, be fully gone into.

It must always be borne in mind, in considering the rule of the *English* law on this subject, that it has reference to a trial by jury, and that we have no provisions for limiting the standard of comparison, or regulating the manner of conducting the inquiry; both of which, it seems, have been found necessary where such a mode of proof has been admitted. It will be found not at all irrelevant to the present inquiry to observe these provisions in the ecclesiastical and French laws; for they seem not only to fortify the rule of our law, constituted as our mode of trial now is, but by their apparent inadequacy, in many supposable cases, and in the case of the ecclesiastical law, by the alterations which it has been found expedient to introduce into the practice, to make us satisfied with its present constitution. From 1 *Oughton's* Ordo Judiciorum, Titulus De Comparatione Literarum, &c. ad Probandum Manum Testatoris, sections 1, 2, 3, 10, 11, it appears, that when the handwriting of a testator or other principal party were disputed, and the attesting witnesses were deceased before the suit commenced, or were not called, it was allowable to proceed by the comparison of other instruments. These instruments of comparison were required to be proved *by witnesses who saw them written.* It was for the judge to decide whether they were sufficiently proved, and then the comparison was made by sworn comparators, whom he appointed, to the number of four or six, e senioribus procuratoribus et peritioribus in arte scribendi. The provision that the witnesses must have seen the party write the documents, which were to form the standard of comparison, would in our law make any comparison unnecessary; and the act of comparing here as in the French law, also will appear to be the case, was considered not so much the function of a witness, as the exercise of skill in a particular art, by ministers of the Court, accredited by it, and it should seem, in the absence of conflicting evidence, conclusively deciding the point in question. This mode of viewing the matter does indeed relieve it from some of the inconveniences above pointed out; but it is obviously inapplicable to the trial by jury; and as the cause might turn entirely on the will or other instrument being signed by the testator or other party alleged, it in effect left its decision, not to the judge, but to the delegated comparators, who proceeded in his absence. *Oughton's* work was published in 1728, and, I apprehend, is considered to have faithfully represented the practice then prevailing. I have been at some pains to ascertain what the present practice is, and I find that that whole proceeding which *Oughton* describes has long been entirely obsolete. But that is not

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all: in 1813 a case of *Spear* v. *Bone* came before the delegates, between th next of kin and executors in a will. On the face of the will alterations appeared, and a third party, being the sole executor as it originally stood, intervened, and the allegation which he gave in raised the very question of comparison of handwriting, and the admission of this allegation was the matter in discussion before the delegates. I have been favoured by Dr. *Nicholl* with the printed papers of Dr. *Arnold*, one of the delegates, and his manuscript note of the arguments. The Court, after a very learned argument and much discussion, directed the allegation to be reformed; and I am enabled to state that the reformation was settled with the full concurrence of all the delegates. Dr. *Arnold's* paper-book, which I have, contains the allegation as altered in his own handwriting. In 1816 the cause came on again, and the allegation stands reformed in the printed paper, as settled in manuscript, and that has ever since been considered the only proper form of pleading. The allegation originally alleged, that upon an accurate examination of the said will *by writing engravers, and others accustomed accurately to examine the formation of the letters of different handwriting from their general occupation of making engravings of handwriting, fac simile, and otherwise*, and otherwise best able to judge accurately thereof, it manifestly appears that the words and letters of the alteration aforesaid, are not of the handwriting of the person who wrote the will, but that the same, though in many respects very like the writing of the other parts of the will, bears the appearance of having been touched with the pen a second time, as if done by some one endeavouring to copy or imitate the handwriting of another person. It was thus reformed: that upon an examination of the said will, it appears that the words and letters of the alteration aforesaid are not of the handwriting of the person who wrote the will, but are in a feigned handwriting, and that the same is well known to persons skilled in handwriting. From all this it appears, that although comparison of handwriting is still an admitted mode of proof in ecclesiastical courts, yet they have found it expedient to contract rather than enlarge the limits of its admissibility, bringing their rule more and more near to that which has hitherto prevailed in the Courts of common law; a reason, as it seems to me, of no little weight against our admitting such a head of evidence into our practice.

The ecclesiastical law appears to have made no limitation as to the quality of the instruments, which might be made the foundation of the comparison, "alia scripta quamvis omnino impertinentia ad causam institutam (*a*)." The French law is more precise; it defines not only the persons who are to make the comparison, (sworn "*experts*," three in number, appointed by the Court, or agreed on by the parties,) but the writings to be submitted to them. In the Code de Procedure Civile, Part I. 1, 2, tit. 10, s. 200, are found the provisions on this latter point. The writings must either be of a public nature, such as signatures made before a notary or judge &c., or papers written and signed in some public capacity; or if private papers, they must be admitted in the *cause* by the party to whom they are attributed to be of his own handwriting; a previous admission of them, or previous proof, will not make them admissible. These latter restrictions are evidently framed at once to secure the genuineness of the specimens, and to meet the incon-

(*a*) Oughton, vid. jud. tit. 225, s. 3.

venience of contradictory testimony as to this point; but they do not tend to the production of writing in the most natural character, and in a great many cases put it in the power of the party to exclude such from the comparison. *Pothier*, indeed, in his Traité de la Procedure Civile, Part 1. c. 3. sect. 2. art. 1. §. 2. (*a*), seems to consider private writings or signatures as practically forming no standard of comparison on this last ground. It is obvious in how many cases it would be impossible to produce writings of an individual answering to the description here given of public writings.

I have been thus (I fear tediously) minute in stating the general rule, and the principles on which I conceive it now rests, and I think it unnecessary to cite any authorities in support of it, because no question is now made whether that rule exists or is well founded, but it is contended that the facts of the present case fall within it. It is not denied that immediate comparison is inadmissible, or that the witness must speak from a knowledge of the general character of the handwriting; but it is asserted that here there was no such comparison, and the evidence tendered was founded on such knowledge. In order to determine this, it was necessary to have the rule and the principle of the rule distinctly in view; and it was desirable to see whether it rested on a sound foundation. Disregarding extreme cases, from which no inference can be safely drawn, and bearing in mind the mode of trial, with reference to which it has been framed, I confess I have no desire to see the rule altered or narrowed, nor am I disposed to take any case out of it, on account of a merely colourable difference in the facts, if they still remain within the principle.

Now in the present case it must be conceded, that the witness had not acquired his knowledge of the character of the handwriting, whatever it was, in either of the ordinary modes. He had studied certain signatures selected by one party, and had acquired an impression of some general character pervading the whole; he had heard it proved that those were written by the witness *Stribling*, and from these materials he was to speak. It is asked how does this differ from the case of knowledge acquired in the course of a correspondence, where the standard rests equally on the assumption that the letters are written by the party whose they purport to be? With respect to the *assumption*, there will be a fitter place to point out the distinction; but I answer *here*, that the two cases differ in that which is *essential* in the undesignedness of the one, the facts that the letters are written in the course of business, without reference to their serving as aids for a collateral purpose, in some future unknown cause, and in the selection which is made in the other by the party to the cause, who seeks to produce them for a particular purpose. I have, therefore, no reasonable assurance that the witness has the materials for ascertaining the *general* character of the hand-writing, which is the knowledge to be acquired, and the facts are in this respect similar in principle to those of *Stranger* v. *Searle* (*b*), where Lord *Kenyon* would not allow a witness to speak from the knowledge which he had acquired, even by seeing the party write several times previously to the trial, because it was done for the avowed purpose of shewing, as he alleged, his true manner of writing. These were in truth selected specimens, though beyond all doubt genuine; but they could not be safely trusted to as giving the general character of the handwriting.

(*a*) Œuv. Posth. tom. iii. p. 46, edit. 1809. (*b*) 1 Esp. 14.

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But this is not all. No fraud is imputed in the present case; but I cannot forget that we are called on to lay down a rule applicable to all civil and criminal cases, and I ought to be careful therefore that I do not so lay it down as to open a door to fraud of the most fatal kind. In the present instance the writer himself admitted the signature to be his, but that was only one mode of proof. It cannot be contended that the case would have been altered in principle if a third person had proved them, or if they had purported to be the signatures of the testator or of the party in the cause, and so necessarily proved by witnesses other than the supposed writer. If such evidence be good for any, it is good for all purposes. If it be receivable in confirmation of other testimony, it is receivable alone. If to disprove handwriting, it is equally so to prove it, and a conviction of forgery might pass on the opinion which a single witness might form, founded solely on the examination of signatures, or a single signature, presented to him the night before by a prosecutor, who need not be called as a witness on the trial, to explain when and where such specimen had been procured, or from how many selected; the prisoner, on the other hand, being wholly unprepared to enter into this explanation. It is no answer to this to say that a similar result might follow upon the evidence of a witness who had seen the prisoner write his name but once. That is an extreme case, upon *a principle unobjectionable in itself;* for no one can deny that the seeing a party write is at least one correct mode of acquiring a knowledge of his hand-writing. Here the *danger is in the principle itself*, that selected specimens may be made the standard from which the witness is to judge.

Furthermore, as the admissibility of this species of proof cannot depend on the fact of the signatures having been proved by the admission of the writer himself, I would ask, what course is to be pursued where the writing which is to form the standard is itself disputed. Is the counter evidence to be received at once as to this point, and the opinion of the jury to be taken on the preliminary and collateral issues, before the evidence is heard as to the principal document? Or, is that to be gone into after primâ facie proof on the collateral issues, and to be received, subject to being entirely displaced by the answer on the other side? Or, lastly, is the judge to decide this question of fact? I believe it is impossible to answer this question without either introducing a most inconvenient novelty in our procedure at nisi prius, or involving the jury in a complication of issues, from which it is too much to expect that they should escape safely.

Again, and connected with this last remark, I have always understood that papers could not be submitted, even to the jury, for the purpose of comparison, except they be evidence on the issue then in course of trial before them. This was so decided by this Court in *Doe* v. *Newton* (*a*), in affirmance of some previous decisions. But in the present case the documents were not evidence in the principal cause, yet they must have been submitted to the jury, who, before they listened to the evidence of the witness as to the attestation to the will, must have been required to decide in their own minds the collateral issue raised on every signature, whether it was that of *Stribling* or not. It will be asked whether, when the witness speaks from knowledge acquired in the course of correspondence, the jury must not also decide in their own

(*a*) *Ante*, p. 403.

minds whether the assumption be a just one, that the letters purporting to be written by the individual were in fact written by him. The answer is, that although, if it were shewn to the jury that the witness was mistaken in the supposition he had made, his evidence must undoubtedly fall to the ground; yet the law makes it in the first instance a presumption that the letters of a correspondence carried on in the ordinary course of business, where the acts done on the faith of it are ratified by the parties, are written or signed by those whose signatures they purport to bear. And this in the absence of all design or selection is a reasonable presumption. The whole, too, depends on the same witness, and no more embarrassment therefore is created to the jury than where the witness says he has seen the party write; in which case they must also determine whether they believe that preliminary statement, before they consider the weight of his evidence as to the particular document. This assumption, no doubt, may sometimes proceed on a mistake; but so may the most direct evidence on handwriting. There is nothing so difficult to put beyond question as the fact that a particular instrument was signed by a particular person. In *Eagleton* v. *Kingston* (*a*), Lord *Eldon* states the rule of evidence as to handwriting, when he first came into *Westminster Hall*, with great minuteness, and limits it even more narrowly than my argument requires. But he mentions a remarkable instance, as regarded himself, of the uncertainty of testimony to this point. A deed was produced at trial, on which much doubt was thrown as a discreditable transaction. The solicitor was a very respectable man, and was confident in the character of his attesting witnesses; one of them purported to be Lord *Eldon* himself, and the solicitor, who had referred to his signature to pleadings, had no doubt of its authenticity, yet Lord *Eldon* had never attested a deed in his life.

In a matter so open to mistake and fraud, and where the consequences are so serious, I have no desire to widen the door of admission. Is there any real distinction, either in principle or consequences, between the facts now before us and one of direct comparison? If, instead of two days, the trial had lasted one,—if, instead of an examination of the signatures on the first day and out of Court, the witness had only seen them in Court, and immediately before he was shewn the will,—would this not have been clearly a case of direct comparison, however the question had been framed or the answer worded? And can it be affirmed that the alteration last stated would have in any respect differed the character of the evidence? Do they remove any one of the objections which have prevailed to exclude direct comparison from our rule of evidence?

Upon the grounds, therefore, that our rule is a sound one, and well established both in what it admits and what it rejects—sound in principle, and convenient with reference to the mode of trial to which it is to be applied, and that the present facts are substantially within the latter branch of it, I am of opinion that the learned judge rightly rejected the evidence tendered. I could have wished to have examined in detail the decisions bearing upon the question, but the importance of the subject, and the difference of opinion which exists in the Court, have induced me (I hope excusably) to examine the principle so much in detail, that I must forbear; and I do so the more readily, because I have no doubt that that part of the argument will be

(*a*) 8 Ves. jun., 473.

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thoroughly illustrated by another member of the Court. I will say this only, that I am not aware of any case of now recognized authority which lays down any *principle* conflicting with those on which I have relied.

I will only add, that I do not feel pressed by the case of ancient writings, in which a direct comparison is admitted. First, I observe that if that proves any thing, it proves more than is now contended for; for direct comparison of modern documents is not now insisted on. But, in truth, as to ancient documents, the necessity of the case and the difference of circumstances have introduced a different *rule of evidence*. You cannot call a witness who has seen the party write or corresponded with him. Nor is there much danger in resorting to comparison of an unfair selection of specimens. Further, it is obvious to remark, that in ancient documents it does often become a pure question of skill, the character of the handwriting varying with the age, and the discrimination of it to be materially assisted by antiquarian studies. This may have naturally assisted in opening the way for the admission of this evidence, even in cases where skill of that particular kind is not necessary.

With real diffidence, therefore, as to the soundness of my judgment, but having formed it with much consideration, I think this rule ought to be discharged.

WILLIAMS, J.—This was an action of ejectment to try the validity of a will; and upon the trial, one of the subscribing witnesses (A.) to the will was called to prove the due execution by the testator, and his own attestation. The fact of his attestation being, in behalf of the lessor of the plaintiff, disputed, and in consequence the genuineness of his (A.'s) signature brought into question, he was asked, upon cross-examination, whether certain signatures, to the number of twenty (then shewn to him) were of his (A.'s) handwriting, and they were by him stated so to be. The cause having been adjourned, these signatures were shewn to a second witness (B.), professing to have knowledge and skill in handwriting, who was directed carefully to examine the same, and upon the day following B. was called on behalf of the plaintiff, and was asked whether, from such examination, he had acquired a knowledge of the character of A.'s writing; and, in answer, he said he had, and thereupon the following question was proposed to him,—whether, from the knowledge he had (so) acquired, he believed the signature of the attestation in question to be A.'s handwriting. Upon objection, the learned judge considered the evidence to be inadmissible, and it was rejected accordingly. And upon a motion for a new trial, the propriety of that decision is brought under our consideration. And the question (important as it is, being connected with principles and practice regulating the admissibility of evidence,) seems mainly to be reduced to this point,—whether the knowledge, which the witness professed to have, was acquired by means prohibited by any known and established rule of law. It is quite superfluous to remark, that with the admissibility only is our concern. How far the evidence, if received, might have answered the intended object or fallen short of it, with what observations it might or ought to have been accompanied, I think it wholly unnecessary to inquire.

Now, that proof of handwriting is to be submitted to the consideration of the jury, like every other species of proof, I apprehend to be clear. From the highest degree of certainty, carrying with it perfect assurance and

conviction, to the lowest degree of probability, upon which it is found to be unsafe to act, it may be and constantly is submitted. From continued and habitual inspection or correspondence, or both, carried on till the trial itself, down to a single instance or knowledge, twenty years' old, evidence may be received. I allude, of course, to the case of *Garrells* v. *Alexander* (*a*), where the execution of a bail-bond was held by Lord *Kenyon* to furnish means of knowledge. The authority of this case is indeed questioned by Lord *Eldon*, upon another point, because the witness would not go so far as to express any belief; but as to the competency of a witness founding himself upon a single instance, (and *Burr* v. *Harper* (*b*) is to the same point,) we have his (Lord *Eldon's*) important and prevailing testimony. In the case of *Eagleton* v. *Kingston* (*c*) he thus expressed himself as to what he considered the rule and course of proceeding in such cases:—"You call a witness, and ask whether he had ever seen a party write; if he said he had, whether more or less frequently; *if ever*, that was enough to introduce the subsequent question, whether he believed the paper to be his handwriting; if he answered that he believed it to be so, that was evidence to go to the jury. You might call one who had not seen him write for twenty years, and if he said he believed it was the writing of the person, that evidence might go to the jury, but to be affected by all the rest of the evidence, *as it is the nature of all evidence to be more or less convincing.*"

The observations above applied to knowledge gained by seeing a party write, must, I presume, be admitted to be applicable to knowledge gained from correspondence "acted upon," as the phrase has been, or, in other words, where there has been something to shew that it was really the writing of the party, whose on the face of the letter it purports to be, subject to the qualification of Lord *Eldon*, which seems to be the criterion and to decide the question in each case. I am aware of no rule attempting to prescribe the quantity of knowledge which is requisite to enable a witness to speak to his belief; what degree of freshness and recency in the correspondence to admit, or what antiquity to exclude, may (as the reason of the thing would induce one to expect) in vain be looked for. To the jury it must go, in the language of Lord *Eldon*, from the highest to the lowest. That the evidence therefore ought to have been rejected, from the slender and inefficient nature of it, would not be contended: indeed the very objection implies the contrary. The question therefore comes, as I stated at the outset, to the means by which the knowledge of the witness was acquired; and the objection is twofold, first, that it was acquired merely by the comparison of writing, and next, that at all events it was not acquired by either of the legitimate and recognized modes already referred to, that of having either seen the party write or corresponded with him.

As to the first, if the objection is to be understood in the sense in which it has been (2 *Stark.* 374 (*d*), *Roe* d. *Brune* v. *Rawlings* (*e*), *Doe* d. *Tilman* v. *Turner* (*f*)) from the time of the reversal of *Algernon Sidney's* attainder, which recites that the jury were directed to believe a certain paper to be the prisoner's, *from comparing it with other writings of his*, it is to be observed that it does not apply. Whether what was done be *equivalent* is another question. The witness not having before compared the disputed signature with those

(*a*) 4 Esp. 37.
(*b*) Holt's N. P. C. 420.
(*c*) 8 Ves. 473.
(*d*) Second edit.
(*e*) 7 East, 282, n. (*a*).
(*f*) 1 R. & M. 141.

admitted, but having acquired *some* knowledge by an attentive examination of them (the admitted ones) is first called upon in Court to inspect the questionable signature, and give an opinion from such knowledge, and not from comparison, by juxta-position, of the signatures themselves. I beg to be understood as by no means intimating an opinion, that the rule which has obtained with respect to the comparison of handwriting should be disturbed, *because* upon examination it may appear to depend upon reasons not perfectly satisfactory. It seems to me that the evidence, so far as this objection is concerned, was admissible, because it was not the comparison of handwriting in the proper and ordinary sense of the term. To reject it, because what was *equivalent* to a comparison of handwriting took place, would go far, so far as the reason of the thing is concerned, towards disturbing the rule altogether, and letting in a comparison of handwriting as a medium of proof in all cases whatsoever, or excluding in a great degree all possibility of proof. What is to be said where the means of knowledge are derived from a bygone correspondence of considerable standing? What is it but comparing a distant and (in proportion to the length of time) faint image in the mind with the writing in question? I will only refer to the observations of Mr. *Starkie* (*a*) in his learned and valuable work, and those of Mr. *Phillips* (*b*) on the same subject. In a still earlier work, which the author used to say was more used by other writers than noticed, I mean a Treatise upon the Law of Evidence appended to his edition of *Pothier*, by the late Sir *W. D. Evans*, I find the following remarks, with others to the like effect:—"But where in point of reason is the objection to proof by comparison of hands, as founded upon an inspection at the trial? What is the common evidence of knowledge but an act of comparison; a comparison of the object presented to the sight, with the object imprinted by memory in the mind with the image and copy of the supposed reality? And when the comparison is made not with this imperfect and fallacious copy, but with an undisputed original, applied with the skill and experience of persons habitually devoted to similar inquiries, it is deemed not only a matter of technical caution, but an essential point of constitutional liberty to reject the assistance which it may be naturally expected to afford" (*c*). I would repeat, that I doubt the propriety (not to say the right) of this Court, upon plausible objections merely, to disturb long established practice and usage, in a case too of such frequent occurrence; but for the sake of the rule itself, and its security, I would confine it to the case of actual collation and comparison, which, when done in Court and before the jury, is supposed to be attended with inconvenience as to them. Unless a jury could read they would be unable to judge of the supposed resemblance; *Douglas*, C. J. in *Burr* v. *Harper* (*d*), which furnishes a reason against such comparison altogether.

The recency of the information and acquaintance acquired in this case can surely not operate as a valid objection. Suppose a person to have seen another sign or write a paper, or to have received one or more letters from him, but from length of time his general recollection was become so faint and indistinct that he should be unable to form an opinion, might he not peruse and study those authentic documents, if in his possession, to improve and refresh his knowledge before he was called upon to give evidence respecting

(*a*) 2 Stark. 375, 2d edit.
(*b*) 1 Phil. 472, 6th edit.
(*c*) 2 Evans's Pothier's Law of Obligations, Appendix, No. 16, s. 6, p. 185.
(*d*) Holt's N. P. C. 421.

the writing of that person by whom such papers or letters, as above supposed, were confessedly written? I apprehend he certainly might. Up to the extent of the above observations, if not beyond them, the very point has been decided in the case of *Burr* v. *Harper*. In truth, the reference was made in that case not to revive and refresh, but to *gain* knowledge. And would such perusal be admissible if made a week or a month before the trial, but not so if made an hour before the witness went into Court to give his opinion upon the particular writing in question?

The case of ancient documents, it must of course be admitted, depends upon a ground distinct from our present inquiry—necessity. Some considerations, however, not wholly foreign perhaps to our present subject, may be collected from that head of evidence. That an attentive observation of writing, assumed to be that of a particular person, is allowable for the purpose of acquiring knowledge of its character, so as to enable a witness to give evidence of his opinion and belief, must, I presume, be considered as placed beyond a doubt. In *Brookbard* v. *Woodley* (*a*), *Yates*, J. is said to have decided the contrary; but Lord *Hardwicke's* authority (*b*) is expressly in favour of it, and so are the more recent decisions, without exception. Whether, by studying the assumed handwriting, the witness should have acquired a knowledge of the handwriting, and then apply himself to the writing to be proved, or whether an actual comparison may be made, and so a foundation of knowledge laid, does not seem equally clear. *Holroyd*, J., than whom a more sound and safe authority cannot be quoted, was of the former opinion, *Sparrow* v. *Farrant* (*c*); the latter course was pursued by Lord *Tenterden*, in *Doe* d. *Tilman* v. *Tarver* (*d*), who, at the same time, quoted a case before *Lawrence*, J., to the same effect. But whichever course be the correct one, I apprehend it to be clear, that no objection can be made from the time at which the information is obtained upon which the proof is given. In the two last cited cases, it is obvious that the witness was called upon to pronounce an opinion in the midst of the trial, without any preparation before.

I come now to consider whether the witness in this case had *any* legitimate means of knowledge to authorize the question, the answer to which was rejected.

It has been said, that the specimens selected may have been garbled and fallacious, "calculated to serve the purpose of the party producing them, and therefore not exhibiting a fair specimen of the general character of the handwriting." And this, it will be recollected, is the second usual objection to the admissibility of the comparison of handwriting. (*Douglas*, C. J. in *Burr* v. *Harper*.) The first having been before noticed, I have before endeavoured to explain why, in my opinion, the objection arising from such comparison was not applicable in fact to this case. Supposing, however, for the present purpose that it is, I cannot perceive how it can be affirmed that this was a partial selection by those who wished to use the papers. The selection was not depending upon their power merely. The whole was subjected to the answer of the witness. The papers produced might all have been admitted to be of his handwriting, or one-half, or any other portion of them, or all might have been denied. When the papers were so admitted, was there not then *some* proof that they were of the witness's handwriting? And, if so,

(*a*) Peake N. P. C. 20, n.
(*b*) Bull. N. P. 236.
(*c*) 2 Stark. 375, n. (*x*), 2d edit.
(*d*) *Ib.* R. & M. 141.

how can the case differ in kind, though it may in amount or degree of proof, from the perusal or reperusal of a couple of letters written, the one ten, the other five years before? Why may the witness give an opinion of any person's handwriting from a study of such letters? Because the writer has in some manner authenticated them to be his. Why might the witness have been asked the proposed question in this instance? Because the witness had sworn that the papers were of his handwriting. In each case it is from the *verusal* of papers (and perusal *only*) that the knowledge is acquired. In each case there is *some* proof that the papers to be perused in order to form a judgment are those of the parties respectively, respecting whose handwriting in the particular case the question and inquiry arise. To which of the two species of proof preference should be given, is a matter, upon which opinions may vary, and foreign to the present purpose. The only question, as it seems to me, is, whether in both cases there is not *some*.

When speaking of the facts necessary to introduce knowledge of handwriting, not from actual inspection, but from correspondence, I adverted to an expression in frequent use, and which indeed has almost gone into the currency of a proverb upon this subject,—that the letter or letters "*must have been acted upon.*" If, however, by this expression it be meant to imply that any business must be transacted, or in any sense of the words *act done*, the observation is without foundation, for nothing of the sort is necessary. This was expressly decided by *Holroyd*, J., to the value and weight of whose opinion I have given my unnecessary, though sincere, testimonial. Any thing, I presume, from which the identity of the writer is established, may suffice. If then from such proof, whence a reasonable inference may arise, that the letter or signature is by such or such a person, an opinion of his handwriting may be given, the question recurs whether there be not *some* foundation for opinion where the party has, upon his oath, declared that the papers perused by the witness were written by himself. That no person has hitherto been allowed to speak of his belief of handwriting, except he has acquired his knowledge by one or other of the prevalent methods (having seen the party write or received writing from him) may doubtless be true; but it is, I fear, but an imperfect solution of the present difficulty. May not the answer be, that the case is new? In truth, *has* it ever arisen before? If not, we are called upon, as in the various and ever-varying combinations of human affairs continually does and must occur, to apply, as well as we can, the principles and analogies, having the nearest and most direct affinity to the subject, to this fresh question. It is hardly necessary for me to observe, that the view which I have taken of this case secures me from touching at all upon the authority of the recent decision of this Court in *Doe* v. *Newton* (*a*), and of the Exchequer in *Griffith* v. *Williams* (*b*); I quite accede to the propriety of rejecting the evidence tendered in the former case, and of the line of distinction established in the latter. It is still less necessary, after what has been observed, but, at the hazard of repetition, I am desirous to avoid the possibility of all misconception to say, that I have throughout assumed the rule with respect to the comparison of handwriting to be perfectly fixed and established. Whether, after all that has been said and written against the comparison of handwriting, opinion and belief are not *virtually* formed in a

(*a*) *Ante*, 403. (*b*) 1 C. & J. 47.

great variety of instances upon comparison, and that not of the most satisfactory kind, is another question. The rule I find absolutely settled, and that is enough for me. If by argument, or upon further consideration, I could have been satisfied that the rule would have been infringed upon by the admission of this evidence, my task would have been easy, and a conclusion speedily arrived at. It is precisely because, as it seems to me, the admission of this evidence would have been according to and in pursuance of the rule, I think the rejection improper.

Whether the objection was worth the making when the value of the evidence is considered, I will not undertake to say; but the question has arisen and must be disposed of. If it should be thought so, this only resembles another instance not unconnected with it, (*Goodtitle* v. *Braham* (*a*), *Carey* v. *Pitt* (*b*), *Rex* v. *Cator* (*c*), *Gurney* v. *Langlands* (*d*),) the opinion of an *expert* upon the genuineness of handwriting; where the difference of opinion upon the admissibility of the evidence has been much greater than the importance which, by universal consent, ought to be attributed to it if received.

That the present case is, in its precise circumstances, new, must, I presume, be admitted. Such an occurrence, however, must, perhaps, from the nature of things, be deemed unavoidable. The saying of Lord *Mansfield* (*e*), when pressed by some citations from them, "That he did not now sit to receive rules of evidence from *Siderfin* and *Keble*," may possibly be considered as rather bold, but I have no doubt that it was a true one of Lord *Kenyon*, *Keeling* v. *Ball* (*f*), in deciding a fresh point of evidence, "That it is the business of courts of justice to apply the general principles of the law to new cases as they arise."

Upon the whole, with sincere respect for the contrary opinions, I think the evidence was improperly rejected, and that there ought to be a new trial.

PATTESON, J.—In this case one of the attesting witnesses to a will having been called, and having sworn to the publication and his own signature, twenty documents were put into his hand in cross-examination, all of which he swore to have his signature. None of these documents were used as evidence in the cause, nor could have been, unless with reference to the handwriting of this witness, or as regards two of them, for the purpose of contradiction, those being the witnesses' depositions in the Ecclesiastical Court. The twenty documents had been previously shewn to an inspector from the Bank of England, and after the examination of the witness, were again submitted to the same person. The cause was not concluded on that day, and the next day the inspector was placed in the witness box for the purpose of swearing to his belief that the signature of the attesting witness to the will was not the handwriting of the witness who had been examined the day before. He was asked how he had acquired a knowledge of the handwriting of the witness, when he stated it to be in the manner above-mentioned, and none otber. The learned judge rejected his testimony; and the question is, whether he was right in so doing?

All evidence of handwriting, except where the witness sees the document

(*a*) 4 T. R. 497.
(*b*) Peake's Add. Cas. 130.
(*c*) 4 Esp. 117.
(*d*) 5 B. & A. 330.
(*e*) 1 W. Bl. 366.
(*f*) Peake's Add. Cas. 89.

written, is, in its nature, comparison. It is the belief which a witness entertains upon comparing the writing in question with an exemplar in his mind derived from some previous knowledge. That knowledge may have been acquired either by seeing the party write, in which case it will be stronger or weaker, according to the number of times, and the periods, and other circumstances, under which the witness has seen the party write; but it will be sufficient knowledge to admit the evidence of the witness (however little weight may be attached to it in such cases) even if he has seen him write but once, and then merely signing his surname; (*Garrells* v. *Alexander* (*a*), *Powell* v. *Ford* (*b*), *Lewis* v. *Sapio* (*c*);) or the knowledge may have been acquired by the witness having seen letters or other documents, professing to be the handwriting of the party, and having afterwards communicated personally with the party upon the contents of those letters or documents, or having otherwise acted upon them by written answers, producing further correspondence or acquiescence by the party in some matter to which they relate, or by the witness transacting with the party some business to which they relate, or by any other mode of communication between the party and the witness, which, in the ordinary course of the transactions of life, induces a reasonable presumption that the letters or documents were the handwriting of the party; *Lord Ferrers* v. *Shirley* (*d*), *Bull. Nisi Prius*, 236, *Carey* v. *Pitt* (*e*), *Thorpe* v. *Gisburne* (*f*), *Harrington* v. *Fry* (*g*), evidence of the identity of the party being, of course, added aliunde, if the witness be not personally acquainted with him. These are the only modes of acquiring a knowledge of handwriting, which have hitherto, as far as I have been able to discover in our law, been considered sufficient to entitle a witness to speak as to his belief in a question of handwriting. In both, the witness acquires his knowledge by his own observation upon facts coming under his own eye, and as to which he does not rely on the information of others, and the knowledge is usually, and especially in the latter mode, acquired incidentally, and, if I may so say, unintentionally, without reference to any particular object, person, or document. A third mode is now sought to be introduced, namely, by satisfying the witness, by some information or evidence, that a number of papers are in the handwriting of the party, and then desiring him to study those papers, so as to acquire a knowledge of the handwriting, and fix an exemplar in his mind, and afterwards putting into his hand the writing in question, and asking his belief respecting it; or by merely putting certain papers into the witness's hands, without telling him who wrote them, and desiring him to study them, and acquire a knowledge of the handwriting, and afterwards showing him the writing in question, and asking his belief whether they are written by the same person, and calling evidence to prove to *the jury* that the former are the handwriting of the party, which, perhaps, may be considered as the same process in effect, expressed in other words.

The very foundation of this mode is the establishment of the fact, that the papers, from studying which the witness is to acquire his knowledge, are the handwriting of the party. Now, that fact must be established either by the acknowledgment of the party, or by the information of third persons.

(*a*) 4 Esp. 37.
(*b*) 2 Stark. N. P. C. 164.
(*c*) M. & M. 39.
(*d*) Fitz. 195.
(*e*) Peake Add. Cases, 130.
(*f*) 2 C. & P. 21.
(*g*) 1 R. & M. 90.

Assuming the witness to be the only person to be satisfied of the fact, it is obvious that the acknowledgment of the party, if the witness be called to affirm the handwriting, would be a most unsafe ground on which to act, and was so considered by Lord *Kenyon*, in *Stranger* v. *Searle* (*a*); and if the witness be called to disaffirm the handwriting, the acknowledgment of the party, unless he be a party to the suit, ought not to bind the litigants; and if he be a party to the suit, it may fairly be urged that the case would come within the second mode of acquiring knowledge above suggested, namely, by a direct communication with the party. The other modes of satisfying the witness, viz. by the information of third persons, is equally open to objections, as it must be given behind the back of one or both of the litigant parties, and would be obviously most unsafe and unfair. The jury, therefore, must be satisfied of the fact. Now that must be by evidence, and will raise a number of collateral issues foreign to those on the record, and for which one of the litigants must of necessity be wholly unprepared, in addition to the danger of unfair selection by the other litigant, who produces the papers. I need hardly advert to the great inconvenience and waste of time which will be incurred by such a wide range of collateral matter, nor to the observation, that the proof of the papers in those collateral issues might be by calling a witness who had acquired his knowledge of the handwriting in the very same way, from other papers, which would equally require to be proved, and so it is obvious that the same process as is now attempted might be repeated ad infinitum, and lead to no conclusion. But if the proof of the papers in those collateral issues be by calling witnesses who have acquired their knowledge of the handwriting by either of the two modes, which I consider to be the only legitimate modes, those witnesses must, from the nature of their evidence, be much more competent to form an opinion as to the handwriting in question in the cause, than the witness whose evidence is proposed to be introduced by such a process. And, after all, when that evidence is introduced, what is it but a comparison of handwriting?

Now a direct comparison of handwriting by a *witness* has been, with the exception of one or two supposed cases, uniformly rejected, and it is only in very recent times that *a jury* has been allowed to institute such a direct comparison, and even that has been confined to a comparison between documents proved and given in evidence in the cause, being relevant to the issues raised on the record, and which, being before the jury, it is hardly possible to prevent a comparison being instituted; *Griffith* v. *Williams* (*b*), *Solita* v. *Yarrow* (*c*), *Rex* v. *Morgan* (*d*), *Allport* v. *Meek* (*e*), *Bromage* v. *Rice* (*f*). One authority to the contrary is to be fouud in *Allesbrook* v. *Roach* (*g*). But this Court recently, in the case of *Doe* v. *Newton* (*h*), has expressly determined, that documents irrelevant to the issues on the record shall not be received in evidence at the trial, in order to enable *a jury* to institute such a comparison, much less can it be permitted to introduce them in order to enable *a witness* to do so.

I know that it is thought by many persons, that direct comparison of handwriting is more satisfactory than I am disposed to consider it. In a

(*a*) 1 Esp. 14.
(*b*) 1 C. & J. 47.
(*c*) 1 M. & R. 133.
(*d*) 1 M. & R. 134, in note.
(*e*) 4 C. & P. 267.
(*f*) 7 C. & P. 548.
(*g*) 1 Esp. 351.
(*h*) *Ante*, 403.

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work of great merit (*a*), there is this passage, "It cannot, however, be denied, that, abstractedly, a witness is more likely to form a correct judgment as to the identity of handwriting, by comparing it critically and minutely with a fair and genuine specimen of the party's handwriting, than he would be able to make by comparing what he sees with the faint impression made, by having seen the party write but once, and then perhaps under circumstances which did not awaken his attention." I agree to that passage in its very words. There the weakest possible degree of knowledge which can arise from seeing a person write, is contrasted with the strongest possible degree which can arise from a direct comparison, and it is assumed that the specimens are fair, and satisfactorily proved, which, I will venture to say, they will not be in one case in an hundred. But generally I am of opinion, that the comparison, even of an admitted fair specimen with a disputed writing, is far from satisfactory. Nothing can be more fanciful than the opinions persons are apt to form from such comparison, some dwelling on the general character, some on the peculiar turn of a particular letter, and other minute circumstances of similitude or discrepancy, which every man in his own experience must know may arise from the different pen or ink, or haste, or deliberation, with which the same person writes at different times. To my mind, I confess, the knowledge of the general character of any person's writing, which a witness has acquired incidentally and unintentionally, under no circumstances of bias or suspicion, is far more satisfactory than the most elaborate comparison of even an experienced person, called by one side or the other, with a particular object.

I find no express authority that direct comparison of handwriting is admissible in evidence, but many to the contrary. It is, indeed, said by *Pemberton*, Serjt. in *The Seven Bishops' case* (*b*), "That in every petty cause, where it depends upon comparison of hands, they used to bring some of the party's handwriting, which may be sworn to, to be the party's own hand, and then it is to be compared in Court with what is endeavoured to be proved; and upon comparing them together in Court, the jury may look upon it and see if it be right;" and he was arguing against any such comparison in a criminal case. If such was the practice, it has long ceased to be so, and the distinction between civil and criminal cases, as to rules of evidence, is no longer recognized. However, on looking to the report of *The Seven Bishops' case*, it is plain that no question of direct comparison arose, the question really was, whether witnesses who had never seen the parties write, but had seen writings supposed to be theirs, were admissible? The Court constantly said they were not, and compelled the crown to prove the writing by other evidence, and accordingly an admission by all the defendants of their signatures to the alleged libel was proved. So in *Algernon Sidney's case* (*c*), no evidence of direct comparison of handwriting was given, and some of the witnesses swore that they had seen him write (*d*). Yet in the bill for reversing his attainder, it is stated, that he was convicted by illegal evidence of comparison, which, so far as it goes, shews that such comparison was not at that time considered to be legitimate evidence.

Comparison of handwriting has, indeed, been allowed in the proof of very

(*a*) Stark. vol. ii. p. 375, 2nd edit.
(*b*) 12 How. State Trials, 297.
(*c*) 9 How. St. Trials, 818.
(*d*) p. 854.

ancient documents, where, from lapse of time, no living person could have any knowledge of the handwriting from his own observation, as in *Roe* v. *Rawlings* (*a*), *Morewood* v. *Wood* (*b*), *Taylor* v. *Cook* (*c*), *Doe* v. *Tarver* (*d*); but this has been allowed from absolute necessity and the impossibility of better evidence being adduced. Direct comparison by a witness was expressly rejected by Lord *Kenyon* in *Stranger* v. *Searle* (*e*), and by Lord *Tenterden* in *Clermont* v. *Tullidge* (*f*); and it was conceded in argument at the bar in the present case, that the uniform practice in the Courts for many years has been not to receive such evidence. In the case of *Burr* v. *Harper* (*g*), *Dallas*, C. J. allowed what I consider to have been comparison of handwriting, and I do not think that decision right: it was never brought under review, because the verdict was against the party in whose favour it was made. I do not, under these circumstances, feel that I am obliged by authorities to admit of any mode of acquiring a knowledge of handwriting, except the two above suggested; and for the reasons already stated, I am of opinion that no other mode ought to be introduced, and that the learned judge was right in rejecting the evidence.

Lord DENMAN, C. J.—A person whose name appears as an attesting witness to a will, is called by the defendant at the trial, and swears that he attested the will and saw the testator execute it. The plaintiff's case is, that the will was not genuine, imputing fraud, if not conspiracy, to some of the parties concerned. To this attesting witness he professes not to impute perjury, nor participation in the fraud; his theory is, that the witness attested some paper, and believes the will produced to have been that paper; but the defendant says that the witness was herein deceived, that the paper which he signed was not the will, though he thought so, and that the will produced with his name was never seen by him before. In connection with other facts from which he draws this inference, he proves by the same witness many of the genuine signatures of that witness, and then calls a second witness, who, obtaining from these an acquaintance with the character of the attesting witness's handwriting, is to be called upon afterwards to pronounce an opinion whether the attestation to the will is in the same person's handwriting; that is, he is expected to give in substance the following testimony: "I have gained a knowledge of the handwriting of *A.* from examining all the proved signatures, and I am of opinion that the signature to the will is not of the same character of handwriting:" from which, among other things, the jury were required to conclude that the will was not in fact attested by *A.* The effect of this evidence is not under consideration. When the witness, with unimpeached character and unimpaired intellect, came to swear positively to facts on which mistake was scarcely possible, and to that handwriting with which no living person could be so conversant as himself, one can hardly imagine any position of the cause in which any matter of opinion could afford a formidable contradiction to this direct proof. In the present case, however, such a state of things doubtless existed, for the

(*a*) 7 East, 282, note (*a*).
(*b*) 14 East, 327.
(*c*) 8 Price, 650.
(*d*) R. & M. 141.
(*e*) 1 Esp. 14.
(*f*) 4 C. & P. 1.
(*g*) Holt's N. P. C. 420.

learned and able counsel for the defendant took the objection, and we are bound to consider whether, as a matter of strict law, the plaintiff had a right to lay before the jury the evidence that was withholden from them.

In the first place I think it was not contended at the bar that evidence of opinion on this subject was not receivable, though in opposition to a positive statement of fact; and indeed, however specious at first sight, such an argument could not be maintained a moment. There is nothing binding in the most positive assertions of the most knowing witness; they may be untrue from ill intention or mistake; and if untrue, the party interested should be allowed to offer evidence that they are so, which may consist of a variety of circumstances, including the character of handwriting. Suppose, exempli gratiâ, a man to have sworn that he saw a party sign and execute a bond; the evidence of all who were best acquainted with that party's writing, that the signature was not in their opinion his, would surely be admissible.

Taking it then as clear that the undeniable peculiarities of this case do not preclude evidence of opinion as to the handwriting, the only question is, whether the witness called to pronounce one had sufficient materials for forming one, to be admissible for that purpose; and he appears to stand in exactly the same situation as he would have done if called to speak of the handwriting of a party to the suit, whether for or against the genuineness of the document. He may have been called for the plaintiff to prove the defendant's signature to a bill or bond. He did not see him sign it, nor has he ever seen him write; but this is confessedly immaterial if he has had other adequate means of obtaining a knowledge of his hand (*a*). Such is the rule, as Mr. *Starkie* understands it, not in terms warranted by the page of *Buller's Nisi Prius* (*b*), cited in his note, but fairly resulting from the practice.

Within what narrower limits can the line be drawn? The letters forming one side of a correspondence do not prove the handwriting, because addressed to a particular person; that person's evidence may be requisite to shew that *A.* had in some way recognised the letters bearing *A.*'s signature, and was therefore probably the individual who wrote them; but this is quite different from a knowledge of the handwriting, whether they proceeded from *A.* or any other. The clerk who constantly read the letters, and the broker who was ever consulted upon them, is as competent to judge whether another signature is that of the writer of the letters, as the merchant to whom they were addressed. The servant who has habitually carried letters addressed by me to others, has an opportunity of obtaining a knowledge of my writing, though he never saw me write, or received a letter from me.

In a nisi prius case, *Smith* v. *Sainsbury* (*c*), it was necessary to prove the handwriting of an attesting witness; the defendant's attorney was sworn, and said that he believed he knew the handwriting, for he had seen the same signature to an affidavit used by the plaintiff's counsel at an earlier stage of the cause. *Park*, J. overruled an objection to the evidence, observing, "If it was a mere comparison of handwriting it would not do; but it is not so; the witness says he took notice of the signature, and in his mind formed an opinion which enables him to swear to his belief. I have no doubt that it is evidence."

(*a*) 2 Stark. 372, 2d edit. (*b*) Bul. N. P. 236. (*c*) 5 C. & P. 196.

In ancient documents knowledge of an officer's handwriting is frequently obtained by an observation of his signature to papers which he would be called upon officially to sign, and a witness speaking from that knowledge may give an opinion whether any particular writing was made by the same person. The process is therefore recognised as one which may enable one man to form a competent opinion as to the writing of another.

Pausing here for a moment, I must fairly say that I think the syllogism complete. Opinion is evidence of handwriting where it is founded on knowledge obtained from inspection of documents proved to be written by the same party. The opinion tendered here was founded on such knowledge. If, however, any rule excluding such evidence had been promulgated by competent authority, I should at once have yielded my own views. I find no such rule laid down, nor can I deduce one from the mere circumstance that opinion of handwriting has hitherto been formed on other means of forming one. The consequences of excluding knowledge so obtained may be in the highest degree injurious to the interests of truth. Suppose, for example, that instead of Lord *Eldon* (*a*) some person of very inferior rank had appeared to be the attesting witness that he was dead at the time of the trial; that conspirators who forged the deed had been entirely unacquainted with his mode of writing. The production of the instrument, and a perjured oath that he in fact attested, would set up the forgery; a clear knowledge of the character of this man's writing would at once defeat the fraud. But the means of obtaining such knowledge might be unattainable from any one who had either seen him write or held any correspondence with him. From documents satisfactorily proved to have been written by the witness, possibly never heard of till the eve of the trial, complete demonstration might be obtained. Similar evidence proving the genuineness of a disputed attestation might save the life of a person accused of forgery. I adopt, therefore, the rule in Mr. *Starkie's* work, which I think as important as it is intelligible.

No single authority cited in opposition to the rule was applicable to this point, or rather was favourable to the defendant's argument. *Lord Ferrers* v. *Shirley* (*b*), if it proves anything, is against him, for there the Court would have received evidence of a witness's opinion on the handwriting to an attestation, if the papers on which the opinion was founded had been traced to the attesting witness. It was the proof of identity that failed. *Stranger* v. *Searle* (*c*) was before Lord *Kenyon* in 1793. The defence to an action brought on the acceptance of a bill, was forgery of the supposed acceptor's name. The usual evidence of belief having been given by the plaintiff, the defendant produced other writings as his, for the purpose of comparing them with the bill sued on. The objection here taken was a preliminary one, that "it did not appear which was the real handwriting of the defendant; those bills, or those upon which the action was brought, both being proved by witnesses, and that it was besides judging from a comparison of hands." The reporter says, Lord *Kenyon* "ruled that the witness should not be allowed to decide on such comparison of hands." This ruling appears correct on both grounds, but it does not touch our present argument; for here the other documents were proved genuine by the witness himself, and

(*a*) See *Eagleton* v. *Kingstone*, 8 Ves. 476; *ante*, p. 411.
(*b*) Fitzg. 195.
(*c*) 1 Esp. 14.

the inference was not sought to be drawn from comparing the papers, but from enabling another witness to obtain a knowledge of the handwriting from the papers so proved, and then apply it to the paper in dispute. There was however in that case a direct tender of evidence of opinion so formed, for the defendant's counsel then observed, that the witness had seen the defendant write several times; but on his adding that this was when the defendant had written his name for the purpose of shewing to the witness his manner of writing, Lord *Kenyon* rejected the evidence, "as the defendant might write differently from his common mode of writing his name, through design." This objection scarcely required the acuteness of that great judge, but is quite foreign to the present discussion.

In *Allesbrook* v. *Roach* (*a*), a similar defence was made after the usual evidence of belief, and apparently for the purpose of strengthening it. "Another witness was called who had in his possession five bills of the defendant's, which had been proved under his commission, he having been a bankrupt. Upon being shewn the bill upon which the action was brought, he said he did not think the acceptance was the defendant's handwriting." This appears precisely similar to the evidence rejected in the present instance. The reporter adds, "Upon comparing these bills with the acceptance of the bill in question, they were evidently dissimilar." He does not say by whom the comparison was made; we must take this, I think, to have been done by consent. Then, on the defendant's part, a witness who had seen defendant write, declared his belief that the acceptance was not in his writing; then the counsel offered to the jury several other bills, admitted to be of the defendant's writing, and desired the jury to compare them—a course which was objected to, but allowed by Lord *Kenyon*. This case surely does not assist the plaintiff's objection here, since the course there passed unquestioned, which was here declared inadmissible; and the opinion of the learned judge, that the jury might compare writings, does not make out that he would have excluded opinion founded on other documents proved aliunde to be genuine.

The next case in order of time, which never fails to be mentioned when evidence of handwriting is debated, *Goodtitle* v. *Braham* (*b*), furnishes however by no means so valuable an authority as we might expect to find in a trial at bar. The questionable evidence there received was withdrawn by the Court from the attention of the jury, and shortly after, in *Carey* v. *Pitt* (*c*), Lord *Kenyon* expressly pronounced it inadmissible.

Rex v. *Cator* (*d*) is in its circumstances very near the present case, and though only a nisi prius decision, I apprehend that it has always been considered good law. The defendant was tried for a libel said to be written in a feigned hand. A person from the post-office, supposed to be skilful in the detection of forgeries, was asked to look at certain writings in the defendant's natural hand, and then at the libel, and give his opinion whether the libel was in the same writing. *Hotham*, B., after hearing a very extended argument, rejected the evidence. If this witness had been desired to look at those papers the day before, in order to gain acquaintance with the character of the writing, that case would have been identical with the present.

(*a*) 1 Esp. 351.
(*b*) 4 T. R. 497.
(*c*) Peake Add. Cas. 130.
(*d*) 4 Esp. 117.

Can this difference between the modes of questioning the witness make the evidence receivable in one case and not in the other? I apprehend that it may.

The distinction is doubtless very subtle; and in practice the two operations of the mind will be likely to run into each other; but there is an essential difference between casting our eye at the same moment on two objects placed before us in order to judge of their resemblance, and acquiring familiarity with a certain character of handwriting, in order to judge afterwards whether a document bears that character. Mr. *Starkie* thinks the former a much more satisfactory method; but I cannot agree with his remark. An ingenious forger might counterfeit every line and angle so correctly, that to a common eye no discrepancy should betray itself; and yet one who has an intimate knowledge of the individual, might detect a striking difference in the general character of the handwriting, as twins may present no observable diversity to a stranger, and yet be distinguished at a glance by their parents. Besides, on taking a witness's opinion on such a point, an appeal seems to be made to his experience and skill, while the mere ocular comparison of two documents in juxta-position, looks like a mechanical proceeding, a mere act of measurement. Whether these reasons may be thought satisfactory or not, there can be no doubt that in former times the law, while it daily acted on opinion derived from knowledge of the character, regarded comparison of hands as extremely dangerous.

The legislature, in statute 1 *W. & M.* c. 7, (private) declared accordingly the attainder of *Algernon Sidney* void as against law, because (*a*) the jury were directed to believe the writing his, by comparing it with other writings of his. Mr. *Starkie* (*b*) seems to think this recital incorrect, according to our present notion of comparison of hands; and so it certainly is if the report of the trial in the State Trials is faithful. Whether it is or not we have no means of deciding. *Jefferies* is charged with falsifying these reports in some instances; and it is extraordinary that his summing up omits all mention of *Sheppard*, the first of the three witnesses said to have spoken to the prisoner's writing on the trial (*c*). None of the numerous pamphlets, however, impute to the report any misrepresentation in this matter of law. On the other hand, when the act for reversing *Sidney's* attainder passed, the memory was green of the atrocious trial which produced it, and the foulness of the admitted proceedings rendered all exaggeration or misstatement superfluous. But, at any rate, the act is a legislative declaration, sanctioned, as we must believe, by *Somers* and the other great lawyers then in office; that comparison of hands, in the sense in which they understood it, was not a legitimate mode of judging of handwriting; and though there may be a mistake in supposing that course to have been pursued in *Sidney's* trial, no other sense can be assigned to the words of the statute, but that which Mr. *Starkie* states as the present meaning of comparison of hands, i. e. "an actual comparison of two writings with each other, in order to ascertain whether both were written by the same person (*b*)." Cases to this effect are collected in a note in the same page (*b*), though in the following page

(*a*) *Ante*, p. 420.
(*b*) 2 Stark. 374, 2d edit.
(*c*) See however 9 How. State Trials, p. 892, where *Jefferies*, in his summing up, is reported to have told the jury that *Sheppard*, an intimate acquaintance of *Sidney, who had seen him write*, and was extremely acquainted with his hand, had stated that he believed in his conscience the book was "Col. *Sidney's* hand."

an extract is given from the chapter on evidence in *Buller's Nisi Prius*, which speaks of proving the writing of one instrument by a comparison with others; and *Le Blanc*. J. twice admitted a comparison of ancient documents, *Roe* d. *Brune* v. *Rawlings* (*a*), observing, that at that distance of time no better evidence could be obtained. Whether better or not, I will not undertake to determine; but plainly *Holroyd*, J. (one of the most accurate lawyers and profound thinkers that ever sat on the bench,) was aware of a different mode of proceeding with ancient documents, and one more conformable with what appears to have been the ancient practice; for he, in the same note, appears to have ruled differently in such a case. A witness produced, who was able to swear, from his having examined several of such signatures, that he had obtained sufficient knowledge, was permitted to give an opinion with respect to handwriting without *an actual comparison*; *Sparrow* v. *Farrant* (*b*). The same note indeed refers to a most remarkable case of *Doe* d. *Tilman* v. *Tarver* (*c*), in which Lord *Tenterden* directed a person producing a paper bearing a steward's signature to *compare it with other signatures* of the same steward, in books belonging to the manor, and say, upon oath, whether he believed that the writings were by the same person, observing, that he remembered *Lawrence*, J., at Worcester, directing a Mr. *Benjamin Price*, accidentally present, to compare a certain ancient writing with others purporting to be written by the same person, and give his opinion on the identity of the writing. I presume that the same course was taken in *Roe* d. *Brune* v. *Rawlings*. It does not appear, however, that any objection was made to this method of forming an opinion on the writing, nor can it be supposed that any party would be interested in preferring the one mode of proof to the other; nor indeed is it quite clear in fact that the method prescribed by *Holroyd*, J. was not adopted by the three other learned judges who have been named, and the comparison made with the idea in the witness's mind, not with the paper itself. Even if it was not, and supposing the direct comparison to be right, it would not follow that that method was wrong, since both may be proper and admissible; and if it was not inadmissible, I am at a loss to discover any difference between that evidence and the evidence which has been excluded on the trial now under consideration.

But we are not now concerned in deciding between two methods of arriving at a knowledge of handwriting; but whether, when the genuineness of it is in issue, the knowledge that may be derived from other productions of the same hand is to be altogether excluded from the inquiry.

Now, for my own part, I am ready to avow my entire concurrence in the sentiments of my brother *Peake* on this point, but that my opinion goes much further than his. He says, (*d*) (reviewing the cases of *Macferson* v. *Thoytes* (*e*), *Rex* v. *Cator* (*f*), and others of the same period), "The analogies of law, however, appear strongly to support the admissibility of this evidence, for opinion, founded on observation and experience, is received in most questions of a similar nature. There is a certain freedom of character in that which is original, which imitation seldom attains, and the want of that freedom is more likely to be detected by one whose attention has been directed to

(*a*) 7 East, 282, note (*a*).
(*b*) Note (*x*) to 2 Stark. 375, 2d edit.
(*c*) R. & M. 141.
(*d*) Peake's Ev. 105.
(*e*) Peake N. P. C. 20.
(*f*) 4 Esp. 117.

the subject, than by another who has never given his mind to such pursuits. It does, therefore, seem rather too much to say, that such evidence is in all cases inadmissible, though it certainly ought to be received with great caution and meet with little attention, unless as corroborating other and stronger evidence."

With regard to the form in which the question was proposed in the late trial, if the examples of Lord *Kenyon*, *Le Blanc*, J. and *Lawrence*, J. and Lord *Tenterden*, render it doubtful whether it was the only proper form; I think, on tracing the subject through the books, that it was the most proper form. If the proved document and the controverted are both in Court, and the witness speaks to their resemblance or difference from immediate observation, he seems to perform a task for the jury, which every one of them, even though illiterate, might as well perform for himself. But if he is a person of some skill (however low in degree and however generally shared with him) he does what possibly the jury may be incompetent to do. Even in these times some may serve on juries who cannot read and write; but to produce a person who could barely read and write to speak of his own knowledge and judgment in handwriting, would rather tend to throw ridicule than any degree of light on the cause. The witness must be conversant with handwriting, a banker, a printer, the officer of a court of justice, (which was the description, I believe, of Mr. *Price* when Lord *Tenterden* attended the Oxford circuit as a barrister, and Mr. Justice *Lawrence* placed the documents in his hand (*a*),) to be entitled to any degree of authority.

From the substitution of a witness for the jury in forming an opinion on the genuineness of handwriting, an advantage follows, so great and obvious, that it would form a strong motive for so framing the rule of evidence,—I mean the prevention of that distracting multiplicity of issues which a jury might be called upon to try, arising out of every one of the whole number of documents placed before them. If this could be done, a legitimate argument might be raised from the internal evidence of the contents of each paper, and the nature of each transaction alluded to therein. On these points the party could not be expected to come prepared, and infinite injustice might ensue from prejudices of every kind. I therefore entirely adhere to *Doe* d. *Perry* v. *Newton* (*b*), in which we refused a rule nisi for a new trial, moved for on the ground that my brother *Coleridge* had excluded papers tendered in evidence for the mere purpose of being compared with some which were proved. Indeed, in *Griffith* v. *Williams* (*c*), which was urged as an authority for receiving such evidence, the Court of Exchequer drew precisely the line which I think the true one; observing, that the Court and jury might compare letters when they had been admitted for the general purposes of the cause, though witnesses are only permitted to compare them with the character of handwriting impressed on their own minds.

The same effect, I am aware, might possibly be produced if the writings from which the handwriting was judged of were in Court; for I apprehend the jury might then desire to see the documents on which the witness judged; and my brother *Parke* has informed me, that at nisi prius he has felt himself

(*a*) *Doe* v. *Tarver*, R. & M. 143.
(*b*) *Ante*, 403.
(*c*) 1 C. & J. 47.

King's Bench.

DOE d. MUDD v. SUCKERMORE.

bound to permit them. Prejudice might thus be unfairly excited by a crafty selection. This would be an abuse, and when exposed in broad daylight would draw the usual consequences of taking unfair advantages on the party making the attempt. But the possibility of abuse is no reason for excluding what may throw light on the truth, and is in its own nature evidence.

Some other matters were discussed at the bar connected with this interesting subject, which do not require a detailed notice. On the question whether handwriting looked at by itself is genuine or forged, the cases appear to me to have justly exploded the notion that bare inspection by the most skilful person can furnish means for forming an opinion; and *Gurney* v. *Langlands* (*a*) is a correct decision, I think, of *Wood*, B. supported by the dicta of Lord *Tenterden* and *Holroyd*, J. that such an opinion cannot be received from one not acquainted with the handwriting supposed to be imitated. I do not indeed understand how such evidence could be rejected, if a witness should swear that his habits gave him the requisite skill, but I do not think that either court or jury would believe him or place the least reliance upon his opinions; practically, therefore, this chapter may be considered as expunged from the book of evidence.

I know not whether any argument was raised on the knowledge being gained post litem motam, but the judgment is almost always formed post litem motam, both on handwriting and other subjects of speculation: there seems no reason why the knowledge should be not obtained in the same stage; indeed the opinion of medical men is constantly taken on facts brought to their knowledge during the trial.

On the whole I think the question regular, and the exclusion of the evidence improper, but the Court being equally divided, the rule for a new trial must be discharged.

Rule discharged (*b*).

(*a*) 5 B. & A. 330.

(*b*) See Novella, 73. Vol. 2, pages 595, 6, of the Corpus Juris, Elzevir edition, for the mode of verifying documents under the civil law.

The præfatio states, that great frauds having resulted from authenticating documents by the collatio literarum, the practice had been prohibited by some emperors. It recites the error and injustice which had recently occurred in a case where the practice, in the absence of the attesting witnesses, having been adopted, a document had been set aside which afterwards, on the appearance of the witnesses, proved to be genuine. It also refers to the uncertainty of such testimony from the great variation observable in the handwriting of the same person under different circumstances.

The provisions of the Novella itself, under certain extreme cases and in the absence of other testimony, appear to allow the collatio instrumentorum to be employed as a conclusive mode of verifying a document, (cap. 7.) But it evidently was regarded with extreme distrust from the care that is taken (cap. 1.) to secure the judges the comfort (solatium,) of a witness, and the provision (cap. 3.) that where oral testimony to the fact is opposed to that resulting from the collatio literarum, the judge shall decide in favour of the oral testimony.

The practice of the comparison of handwriting seems to prevail almost universally on the continent. See Œuvres des Bentham, tom. 2, p. 325, Traité des Preuves Judiciaires, liv. 4, ch. 8: and Rapport sur la Loi de Procédure Civile de Genève, par M. Bellot, there cited.

BERKELEY *v.* WATLING, NAVE and CRISP.

May 26th.

Assumpsit against *A.*, *B.* and *C.* for not delivering corn alleged to have been shipped by the plaintiff on board the vessel of the defendants.

Plea by defendants *B.* and *C.* that the plaintiff did not ship the corn.

The cargo in fact had not been shipped, but the master of the vessel had signed a bill of lading acknowledging the shipment by defendant *A.* as consignor. *A.* was the managing owner, and had been in the habit of dealing with the defendant by consigning corn to him for sale on commission.

Held, as the plaintiff could only prove his shipment by setting up the agency of defendant *A.*, who was cognisant of all the circumstances, that the plaintiff himself must also be considered cognisant of them, and that the bill of lading therefore did not estop defendants *B.* and *C.* from contradicting its contents, by shewing that in fact there had not been any such shipment.

ASSUMPSIT. The declaration stated, that the defendants were owners of a vessel called "The Search," lying at Yarmouth, bound to Newcastle, and that the plaintiff, at their request, caused to be shipped on board such vessel 168 quarters of wheat, to be delivered to the plaintiff at Newcastle, he paying freight for the same; in consideration whereof, the defendants promised to deliver &c.

Breach, the non-delivery; to which the defendant *Watling* pleaded non assumpsit.

The other two defendants pleaded jointly,

1. Non assumpsit;

2. That the plaintiff did not cause the wheat to be shipped on board the said vessel;

3. That the defendants did convey the wheat alleged to have been shipped on board the said vessel.

On which pleas issue was joined.

The case was tried at the last Summer Assizes for Newcastle-upon-Tyne, before *Tindal*, C. J., when a verdict was found for the plaintiff for 272*l.* 16*s.* 5*d.*, subject to the opinion of the Court on the following case:—

The plaintiff is a corn-factor at Newcastle-upon-Tyne. The defendant *Watling* was, during the years 1833, 1834, and 1835, a merchant at Yarmouth, and during that time dealt with the plaintiff, consigning from Yarmouth to Newcastle cargoes of corn for sale on commission. During that time, and at the time of signing the bill of lading hereinafter mentioned, the three defendants were the owners of "The Search," whereof one *John Blyth* was the master, and *Watling* the managing owner at Yarmouth.

Watling, in a letter, dated 18th April, 1835, addressed to the plaintiff, enclosed a bill of lading for 168 quarters of wheat, signed by the master of a vessel called "The Herring." The letter stated "The Herring" to be bound to Sunderland, and that *Watling* had put the 168 quarters of wheat on board her, and directed the plaintiff to insure for 350*l.*, and remit that amount to him, *Watling*.

The plaintiff, in answer sent to *Watling*, inclosed in a letter dated 22d April, 1835, 200*l.* as an advance on the wheat mentioned in the bill of lading, expressed his regret that the wheat was sent to Sunderland, and stated that there was a demand for it at Newcastle.

On the 25th April, 1835, *Watling*, by letter to the plaintiff, acknowledged the receipt of the 200*l.*, and on the 27th April wrote the following letter to the plaintiff:

"I wrote you on the 25th; I have now your esteemed favour of that date. The Herring will not go to your quay; and as Sunderland is likely to prove a losing market, I purpose, with your permission, to reship the wheat into "The Search," or some other vessel, and do hope this will meet your approbation. It will not do to lose money, and I know what Sunderland is at times. The insurance can be transferred."

On the 2nd of May, 1835, the plaintiff received another bill of lading for the same 168 quarters of wheat, signed by *Blyth*, then master of The

agent for the owners; he possesses an authority analogous to a general authority to indorse bills, and therefore it is in his power to bind his principal in *all* matters relating to the ship, without any special authority communicated for the occasion. If, for instance, in the bill of lading signed by him, he specifies the goods, he would thereby bind the owners as to them (*a*). By the general law he has an authority to sell, and this again points out the difference between him and a factor, who, by that law, has no other authority than to pledge. These powers of the master have always been so understood and acted on. Bills of exchange are constantly accepted on the faith of bills of lading, and monies to a very great extent are constantly raised upon them. *Buller*, J., in *Lickbarrow* v. *Mason* (*b*), describes the mode of these transactions very fully and clearly, and he says distinctly that the property in the goods passes by indorsement to the consignee.—[*Patteson*, J.—This is an action of assumpsit; is there any instance where such an action has been brought by the consignee? Between whom is the contract made?] The consignee and the ship-owner.—[*Patteson*, J.—It has been held, that the contract is with the consignor, *Moore* v. *Wilson* (*c*). Is there any instance where such an action has been brought, where the goods have not been actually shipped?]—Here the plaintiff is in the same situation as if the goods had been actually shipped; they were deliverable to the plaintiff, who, at the time of the shipment, had made advances of money upon them. In *Sargent* v. *Morris* (*d*), where it was held that the action must be brought in the name of the consignor, *Bayley*, J. relies on the fact that no advance had been made by the consignee. He was nothing more than a mere agent of the consignor. In *Hawes* v. *Watson* (*e*), the defendants, who were warehousemen, were held not competent, after giving their note acknowledging that they held goods for the plaintiff, to dispute his title, although all the circumstances of a previous transfer to the vendors of the plaintiff had not been completed.

Moreover, it is quite consistent with the facts stated in the case, that the wheat actually was shipped on board The Search.

Wightman, contrà.—No question was ever put to the jury as to whether the wheat actually was shipped or not. The only point raised was, whether the bill of lading was or was not conclusive. It may be admitted, that between parties whose condition is altered it would be conclusive. Still that determines nothing against the innocent defendants, *Nave* and *Crisp*, on whose behalf alone the point is now contested. In *Howard* v. *Tucker* (*f*), Lord *Tenterden* considered the statement in the bill of lading conclusive, only because the plaintiffs had, perhaps, by it been induced to receive the bill as of more value than they otherwise would have done. *Bates* v. *Tod* (*g*) is to the same effect.—[*Patteson*, J.—The advance here seems to have been made on the credit of the original shipment on board The Herring.]—That, no doubt, was so. The bill of lading of The Search was not sent till April 29, some time after the advance was made.

A bill of lading is in truth nothing more than an acknowledgment or

(*a*) Abbott on Shipping, 217.
(*b*) 6 East, 21 n.
(*c*) 1 T. R. 659; see *Dawes* v. *Peck*, 8 T. R. 330.
(*d*) 3 B. & A. 277.
(*e*) 2 B. & C. 540.
(*f*) 1 B. & Ad. 712.
(*g*) 1 M. & R. 106.

receipt, and must stand on the same footing as other receipts do. Now it is perfectly established, that a receipt is never conclusive. Parol testimony is always admissible to explain or contradict it, *Graves* v. *Key* (*a*), *Skaife* v. *Jackson* (*b*).

In *Lickbarrow* v. *Mason* (*c*), *Buller*, J., observes,—"Where the goods were never sent out of the merchant's warehouse at all, a bill of lading could not possibly exist if the transaction were a fair one; for a bill of lading is an acknowledgment by the captain of having received the goods on board his ship; therefore, it would be a fraud in the captain to sign such a bill of lading if he had not received the goods on board, and the consignee would be entitled to his action against the captain for the fraud." It is quite clear, therefore, that *Buller*, J., never contemplated the possibility of an action under such circumstances against the innocent shipowners. The action should rather have been brought against the master, or *Watling*, alone, with whose transactions the two other defendants were perfectly unacquainted. All the arguments used to shew that the present defendants are liable, are far stronger when applied to shew the liability of the owners of The Herring, and that their bill of lading is binding on them; and the plaintiff, from the application which he made, seems to have been so advised.

W. H. Watson, in reply.—The property in the goods became vested in the consignee, and the consignor could not have brought any action for them, *Dutton* v. *Solomonson* (*d*). In *Brown* v. *Hodgson* (*e*), where the bill of lading expressed the goods to be shipped "by order and on account of *H.*" Lord *Ellenborough*, C. J., held that no property could be recognised as existing in any other person.

The plaintiff also is here a holder of the bill for value. He advanced the 200*l.* on the joint security of the wheat and the bill of lading. It is admitted that, in the first instance, he had a remedy as against the owners of The Herring; but it is clear that, at the request of the defendants, he gave up the bill of lading of that vessel and took the present bill, under such circumstances as gave him a similar remedy against the defendants. He might not have been justified in making the application which he did to the owners of The Herring; but that circumstance has not altered the condition of any of the parties. The plaintiff therefore retains the same right as against the defendants which he had before. It has been said that a bill of lading is a mere receipt; but, on the contrary, it is laid down by all the authorities to be a negotiable security (*f*). According to the principle contended for, it will always be necessary to shew not only that the bill of lading was duly signed, but also that the goods were actually put on board.

It may be admitted that a signature of a bill of lading, when no goods are put on board, amounts to fraud, still that does not render the party less liable; *Rusby* v. *Scarlett* (*g*).

Watling here was not the agent of the plaintiff; the case shews distinctly

(*a*) 3 B. & Ad. 313.
(*b*) 3 B. & C. 421.
(*c*) 2 T. R. 75.
(*d*) 3 B. & P. 582.
(*e*) 2 Camp. 36.
(*f*) Abbot on Shipping, 383.
(*g*) 5 Esp. 76.

that he was the consignor. Supposing even that in this case the plaintiff is to be considered merely as a factor, having made advances, he is still entitled to retain the full amount of this verdict. There is a passage in *Buller*, J.'s judgment, in *Lickbarrow* v. *Mason*, precisely applicable to such a state of circumstances:— "Supposing that the plaintiffs are to be considered as factors, yet if the bill of lading, as I shall contend presently, passes the legal property in the goods, the circumstance of the plaintiff's being liable to render an account to *Freeman* for those goods afterwards will not put *Turing* in a better condition in this cause. For a factor has not only a right to keep goods till he is paid all that he has advanced or expended on account of the particular goods, but also till he is paid the balance of his general account."

Lord DENMAN, C. J.—(After stating the pleadings and facts in the case.)—The question here arises on the second plea, stating that the plaintiffs did not cause the wheat to be shipped on board The Search. The plaintiff contended, that under that plea the defendants were not at liberty to offer evidence to shew that the wheat was not shipped, because by their bill of lading, in the hands of the plaintiff, they had admitted the existence of the wheat on board that vessel. The question therefore is, whether, under the circumstances, evidence was admissible to contradict the bill of lading. I think that it was. The issue which lay upon the plaintiff to prove was, that this wheat was so shipped, and that he could only prove by shewing that *Watling* had shipped the wheat on board that vessel, while acting as his agent in the matter. That being so, it certainly was competent for the other two defendants, notwithstanding the statement in the bill of lading, to prove that no wheat actually had been shipped. Under these circumstances the bill of lading cannot be considered conclusive as against them. This mode of viewing the case relieves us from the necessity of considering any question as to the negotiability of the bill of lading in the hands of third parties; and also the effect of the plaintiff's conduct to the owners of The Herring, which might be contended to be as much an estoppel of the plaintiff as the bill of lading could be of the defendants.

LITTLEDALE, J.—The allegation in the declaration is, that the plaintiff caused this wheat to be shipped on board The Search. That allegation is traversed by the plea. Now the bill of lading signed by the master, and which is offered in evidence in support of the plaintiff's case, states the wheat to have been shipped by *Watling*. In order, therefore, to make the bill of lading evidence for the plaintiff, *Watling* must have been proved to be agent for the plaintiff in the shipping of this wheat. It appears that, in fact, the wheat actually never was shipped on board The Search. But the plaintiff now contends that these two defendants, owners of The Search, are estopped from setting up this fact in their defence, because, by the master of their vessel, they have said that the wheat was so shipped. However, *Watling* knew that this wheat was not shipped, and *Watling*, being in this matter the agent of the plaintiff, the plaintiff himself, therefore, must be taken to have known it. The bill of lading, therefore, cannot be considered as an estoppel, precluding these defendants from setting up as a defence the non-shipment of these goods,—a fact of which the plaintiff, by his agent, was already cognizant. I

think, therefore, that evidence was admissible to contradict the bill of lading.

PATTESON, J.—This is an action by the consignee of goods, not an action by the indorsee of a bill of lading, which is an action quite distinct from the present, and resting on a different footing. The declaration here alleges, that the plaintiff caused to be shipped, &c. He could only be considered as having done so by making *Watling* his agent. If that be so, the plaintiff must himself be considered as the shipper. If the declaration had stated that *Watling* had shipped the wheat that it might be delivered to the plaintiff, and that the defendants had undertaken to deliver, the case might have been different; but as the plaintiff himself was the shipper, how can the bill of lading be conclusive as between him and the owners? Our decision does not affect the question, as to the conclusiveness of a bill of lading between a bonâ fide holder and the shipowners. I should be very sorry to say any thing to impugn the negotiability of bills of lading; we merely determine, that under these circumstances, and between these parties, the bill of lading was not conclusive, and that the evidence was therefore properly received.

Postea to the defendants.

The KING *v.* The Inhabitants of MISTERTON.

June 7.

ON appeal against an order of justices for the removal of *John Wood* and his wife from Stowe in the county of Lincoln, to Misterton in the county of Nottingham, the sessions confirmed the order, subject to the opinion of this Court upon the following case:—

The pauper was removed from Stowe to Misterton on the 13th October, 1834, and pursuant to and as prescribed by the statute, a copy of the order, examination of the pauper, and notice, was sent to appellants, and filed at the sessions, according to the practice thereof. The words of the said examination, so far as relate to any settlement of the pauper, were as follows:—"The pauper saith that he is twenty-three years of age, and was born at Gainsborough, and that at Gainsborough statute, before May-day, 1829, he was hired by Mr. *David Parkinson*, of Thonock, in the parts of Lindsay, farmer, to serve him for a year from May-day 1829, to May-day 1830, for 3*l.* 10*s.* 0*d.* wages. That he went into his service at Thonock at May-day, and when he had been there about a fortnight, his master informed him that the servant of his mother, Mrs. *Parkinson*, of Misterton, in the county of Nottingham, did not suit her, and asked him if he had any objection to change places with Mrs. *Parkinson*'s servant, and go and live with her instead of him; that the pauper said he had no objection, and, without having any fresh agreement, he went to Misterton and served the remainder of his year's service with Mrs. *Parkinson*, and at the end of the year received of her 3*l.* 10*s.* 0*d.*, the amount of his wages." There were no other grounds of removal other than the above stated in the order, examination, or otherwise. The appellants had duly given notice of appeal, and as the grounds of their appeal stated in their

A copy of the pauper's examination, sent with him under an order of removal, after stating that he was hired for a year by *David* at T., that he there served a fortnight under the contract, set out facts which amounted to a dissolution of this contract, and stated that he served out the remainder of the year with the mother of *David*, then a widow at M. the appellant parish. The appellants, in their notice of appeal, assigned as the grounds of it, that on the examination there did not appear any settlement whatever. The respondents were not allowed to shew that *David* had acted as the agent of his father, and that consequently the service with the widow was a continuance of the original service, so as to establish a settlement in the appellant parish.

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notice, that the said *John Wood*, the pauper, did not in fact gain a settlement in the said parish of Misterton by reason of having been hired by Mr. *David Parkinson* of Thonock, to serve him for a year from May-day 1829, to May-day 1830, and by reason of having served first the said *David Parkinson* for a fortnight in Thonock aforesaid, and afterwards the mother of the said *David Parkinson* in Misterton aforesaid, for the remaining part of the said year, under the circumstances stated in the examination of the said *John Wood*, upon which the said order of removal was grounded, and that the contract of service with the said *David Parkinson* was dissolved on the said *John Wood* leaving the same.

The counsel for the respondents, in support of the order of removal, opened that he should prove a settlement in the appellant parish as follows: That the pauper was hired previous to May-day, 1828, by *David Parkinson* the elder, father to the said *David Parkinson*, and husband of Mrs. *Parkinson* hereinafter mentioned, to serve him, *David Parkinson* the elder, from May-day, 1828, for a year; that at that time *David Parkinson* the elder lived at Lea; that the pauper entered the service of *David Parkinson* the elder accordingly, and continued in his service until Lady-day, 1829, when *David Parkinson* the elder quitted Lea, and took a farm at Thonock, and also a farm at Misterton, the appellant parish, to which latter parish the said *David Parkinson* the elder himself went to reside with the said Mrs. *Parkinson*, and placed his son *David* at Thonock, as his the said *David* the elder's servant, to manage that farm. *David* the elder himself never resided at Thonock, nor did Mrs. *Parkinson*. The pauper continued in the service of *David* the elder, but by his direction accompanied *David* the son to Thonock, as the servant of *David* the father. Shortly before May-day, 1829, *David* the son, as the agent of his father *David* the elder, hired the pauper to serve *David* the elder, and as the servant of *David* the elder, for another year from the May-day following; and the pauper continued in the service of *David* the elder, at Thonock, until *David* the elder died, which event took place shortly after May-day, 1829. Shortly after the death of *David* the elder, the said *David* the younger informed the pauper that the said Mrs. *Parkinson*, his mother, the widow of *David* the elder, who continued to reside at Misterton, had a servant at Misterton who did not suit her, and proposed to the pauper to go to Misterton, and that that servant should come to Thonock, which was accordingly done, and the pauper served out the remainder of the year at Misterton, under the original hiring to *David* the deceased, and was paid the *3l.* 10*s.* 0*d.* wages originally agreed upon by the said Mrs. *Parkinson* the widow.

The counsel of the appellants then objected to the counsel for the respondents going into this case or giving evidence thereof, it not being stated in the order of removal, or examination, or notice of removal, or notice of appeal, and being different from the case which the appellants had come to meet, and understood would be attempted to be proved by the respondents. The Court, after hearing counsel on both sides, decided upon hearing the evidence, and confirmed the order, subject to the opinion of the Court of King's Bench, whether the respondents were at liberty to go into or give evidence of the settlement of the pauper, as above opened by the respondent's counsel. The appellants declined calling any evidence or addressing the Court, on the ground that the respondents were not at liberty to go into or give evidence of the case opened.

Goulbourn, Serjt. and *Wildman*, in support of the order of sessions. The question in this case turns upon the effect of the proviso in 4 & 5 *W.* 4, c. 76, s. 81, which confines the respondents, on the hearing of an appeal, to evidence of such grounds of removal as are set forth in the order of removal or the examination of the pauper. The object of this proviso was not to confine the respondents to the identical evidence, but to the particular kind of settlement, previously announced by them. Now the evidence given of the first hiring in 1828, did not put any new case upon the appellants, but confirmed the case of a settlement in the parish by hiring and service, as stated in the examination, by showing that *David* the younger was the agent of his father. *Rex* v. *Kelvedon* (*a*) is almost decisive on the point; it shews that any generality or ambiguity in the terms of the examination, may be qualified or explained by evidence at the trial.—[Lord *Denman*, C. J.—I can see no ambiguity in this examination, or any thing to constitute any sort of settlement whatever. It would be very dangerous to allow parishes to give notice of certain facts from which no settlement appears, and then to prove other facts which completely establish a settlement.]—In *Rex* v. *Kelvedon* the examination disclosed no settlement of any kind; it merely stated that the pauper had heard his father say his own settlement was in a particular parish, and that he had been certificated by it. It could not be conjectured in that case what sort of settlement the respondents meant to set up, whether by renting a tenement, apprenticeship, or hiring and service, or any thing else; yet they were allowed to prove a settlement by apprenticeship. Here the particular sort of settlement, by hiring and service, is given, and there is no variance except in the details of the evidence to support it.—[*Patteson*, J. There can be no doubt that the "master" spoken of by the pauper in his examination was *David Parkinson* the younger.]

Whitehurst, contrà. There cannot be a grosser variance than in this case, where according to the examination there was not a settlement with the appellants; and according to the evidence at the trial there was a settlement. It cannot then be said, that the evidence merely supported the same settlement as was mentioned in the examination, that same settlement being no settlement whatsoever. No doubt the master spoken of in the examination is *Parkinson* the younger; the examination says, that *D. P.*, of Thonock, hired the pauper to serve "him," and then adds, "his master informed him that the servant of his mother," &c. In *Rex* v. *Kelvedon*—[Lord *Denman*, C. J.—We do not think that case much in point.]—In *Rex* v. *Holbeach* (*b*) the variance, which proved fatal to the appellants, was comparatively trifling. A stipulation for a holiday at *Spalding club feast* was specified in the notice of appeal, as turning the hiring relied upon by the respondents into an exceptive hiring, and it was held that the appellants could not, under this notice, give evidence of a stipulation for a holiday at *Holbeach fair*. The appellants go to the sessions to contend that no settlement was gained by service under the contract with the son, as described in the examination; and respondents then put upon them a contract with the father. If the contract was with the father there was a settlement; if with the son, it had been dissolved, and there was not a settlement. What variance can be greater?

(*a*) 1 N. & P. 138. *S. C.* 2 Har. & Wol. 415.

(*b*) 1 N. & P. 137, 138. *S. C.* 2 Har. & Wol. 414.

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[The argument was then interrupted by the adjournment of the Court.](a)

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Lord DENMAN, C. J. (on June 7th) delivered the judgment of the Court.—We need not hear Mr. *Whitehurst* further. This is a case in which a pauper has been removed, with a copy of his examination, which stated that he had been hired by a Mr. *Parkinson*, and had afterwards served with a Mrs. *Parkinson*. On that statement notice of appeal was given, and the appellants stated, as a ground of appeal, that no settlement appeared on the examination, which is obviously true. When the respondents came to the sessions, they sought to give in evidence another state of facts, not indeed inconsistent with those set forth in the examination, but of which the appellants had no previous information. They proposed to shew that the *David Parkinson* mentioned in the examination, had acted as the agent of his father, and therefore that the service with his mother was a continuance of the original service, which certainly would make a good settlement. But we are all most clearly of opinion, that when the appellants have taken issue on the sufficiency of the settlement, as stated in the examination, it is not competent for the respondents to introduce a new state of facts, which, if they had been communicated, would have induced the appellants, if they had found them to be true, either not to appeal or to be prepared with evidence to meet them. It is quite clear that, under the late act, such an alteration of the examination is quite inadmissible.

Order of Sessions quashed.

(a) Lord *Denman*, C. J., *Littledale*, J., *Patteson*, J.; *Williams*, J., sat in the Bail Court for *Coleridge*, J., who was ill.

The KING *v.* The JUSTICES of WARWICKSHIRE.

June 8th.

The notice and statement of the grounds of appeal under the Poor Law Amendment Act, (4 & 5 *W.* 4, c 76, s. 81,) need not be signed by more than the majority of the officers of the appellant parish, and service, without fraud, upon one of the officers of the respondent parish is sufficient.

Semble, per *Patteson*, J.—An assistant overseer is only an overseer to the extent of his warrant, and where his warrant is not produced, the Court will not presume that he has all the functions of an overseer.

RULE nisi for a mandamus to the defendants to hear an appeal against an order for the removal of a pauper from the parish of Norton Lindsey, in the county of Warwick, to the parish of Solihull in the same county. The appeal came on for trial at the Michaelmas Quarter Sessions, 1836, when it appeared that the notice of appeal and the statement of its grounds had been signed by four churchwardens and two overseers, but not by the assistant overseer, of the appellant parish; and that the said notice and statement had been served upon a person who was the churchwarden, and also one of the overseers of the respondent parish, but not upon the other overseer. A preliminary objection having been taken to the hearing of the appeal, on the ground that the notice and statement should have been served upon the other overseer also of the respondent parish, the justices refused to proceed with the hearing of the appeal.

Waddington and *Miller* now shewed cause.—The affidavits in support of this rule disclose another objection. It appears from them that the statement was not signed by the assistant overseer, as well as by the other officers

of the appellant parish. The 81st section of the Poor Law Amendment Act (*a*) provides that the "overseers or guardians of the parish appealing against such order, or any three or more of such guardians," shall "send or deliver to the overseers of the respondent parish a statement in writing, under their hands, of the grounds of such appeal." This clause, by expressly dispensing with the necessity of signature by *all the guardians*, must be taken impliedly to require signature by *all the overseers;* and by the interpretation clause (s. 109) the word "overseer" in the Act comprehends any assistant overseer.—[*Patteson*, J.—An assistant overseer is only an overseer to the extent of his warrant, and, unless you bring his warrant before us, we cannot presume that he has all the powers of an overseer. This was held the other day, with reference to sect. 73 of the act, in *Rex* v. *The Justices of the North Riding of Yorkshire* (*b*). In that case the interpretation clause did not avail.] —It does not appear from the affidavits what are the precise duties of the assistant overseer. There is some difference between the old poor law acts and the present in their language respecting notices. The 9th *Geo.* 1, c. 7, s. 8, requires reasonable notice of appeals against orders of removal to be given by the churchwardens *or* overseers. In *Rex* v. *Beeston* (*c*), *Buller*, J. refers to this section by way of illustration, and adds, that it was never thought necessary that all the parish officers should give notice. But he erroneously read the section "churchwardens *and* overseers." The case of *Doe* v. *Cuthell* (*d*) affords some analogy to the present point; there a lease required that the notice to quit should be given by the landlords, who were joint-tenants, under their *respective hands;* and a notice signed by two out of three of them was held insufficient. In *Doe* v. *Summersett* (*e*), a notice signed by one of several joint tenants was held sufficient; but that decision rested upon the peculiar relation of joint-tenants to each other, each of them being seised per my et per tout.

The other objection is, that the statement was served on one overseer only of the respondent parish. The interpretation clause of the act supports this objection also. In some of the former acts there is an express provision to allow notices to be served upon some of the parish officers as representatives of their whole body. Thus, 41 *Geo.* 3, c. 23, s. 4, as observed by *Taunton*, J., in *Rex* v. *Norfolk* (*f*), allows notice of a rate-appeal to be given to the churchwardens and overseers, or to any two of them; and 49 *Geo.* 3, c. 68, s. 5, allows notice of appeal against a bastardy order to be given to the churchwardens and overseers, or to one of them. *Malkin* v. *Vickerstaff* (*g*) shews that parish overseers are not one body, so as to make one of them liable for the contracts of the other. *Doe* v. *Watkins* (*h*) and *Doe* v. *Crick* (*i*), determining that notice to one of several tenants, under a joint demise, is sufficient to put an end to the tenancy; and the cases, as to the sufficiency of notice of the dishonour of a bill of exchange to one of several partners, are not applicable to such a case as the present, where there is no strong presumption, either from the common interest or common liability of the parties, that notice to one of them would reach the others.

(*a*) 4 & 5 *W.* 4, c. 76.
(*b*) *Ante*, 396, n. (*a*).
(*c*) 3 T. R. 592.
(*d*) 5 East, 491.
(*e*) 1 B. & Ad. 135.
(*f*) 2 B. & Ad. 944.
(*g*) 3 B. & A. 89.
(*h*) 7 East, 551.
(*i*) 5 Esp. 196.

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Hayes and *Daniel*, contrà, were not heard.

Lord DENMAN, C. J.—We have no doubt whatever that signature by the majority of the officers of the appellant parish to the notice or statement of the grounds of appeal, is quite sufficient, and that the service, if without fraud, upon one of the officers of the respondent parish, is quite sufficient also.

LITTLEDALE, PATTESON, and COLERIDGE, Js. concurred.

Rule absolute.

The KING *v.* The POOR LAW COMMISSIONERS.—In the matter of the WHITECHAPEL UNION (*a*).

June 12th.

The Poor Law Amendment Act, 4 & 5 *W.* 4, c. 76, authorises the Poor Law Commissioners to constitute, as part of a union for the administration of the laws for the relief of the poor, a parish, having a local act for the management of its poor, without the consent of the trustees or managers appointed under the local act.

THIS case was argued (*b*) on a former day in this term by Sir *J. Campbell*, A. G., Sir *W. Follett*, *Wightman*, and *Tomlinson*, for the defendants, and by Sir *F. Pollock*, *Bodkin*, and *Thomas*, on the other side. The material facts and the arguments are fully set forth in the judgment of the Court, which was delivered on this day by

Lord DENMAN, C. J. as follows.—This was a rule calling on the Poor Law Commissioners for England and Wales to shew cause why a writ of certiorari should not issue, to remove into this Court a certain order, under the hands and seal of the said commissioners, dated the 21st day of January last, whereby it was ordered, that the parishes, townships, and places, the names whereof were specified in the margin of the said order, should, on the 16th day of February then next, be and thenceforth remain united for the administration of the laws for the relief of the poor, by the name of the "Whitechapel Union;" and that a board of guardians of the poor of the said union should be constituted and chosen according to the provisions of the Poor Law Amendment Act, and in manner thereinafter mentioned. The rule was obtained by two of the trustees for maintaining and employing the poor of the Old Artillery Ground, being one of the places specified in the margin of the said order.

It appears by the affidavits, that the Poor Law Commissioners, acting under the 4 & 5 *Will.* 4, c. 76, formed several different parishes and places into one union, called the "Whitechapel Union," of which the place called the Old Artillery Ground was one; and that in the Old Artillery Ground the administration of the laws for the relief of the poor was conducted under the directions of a local Act of Parliament.

The trustees and managers appointed under that act object to the order of the Poor Law Commissioners, as they say that the act of 4 & 5 *Will.* 4, c. 76, does not authorise them to include in any union any parish or place,

(*a*) See *The King* v. *The Poor Law Commissioners*, *ante*, p. 79.

(*b*) Before Lord *Denman*, C. J., *Littledale*, J. *Patteson*, J. and *Williams*, J.

where the poor laws are administered under a local Act of Parliament; and it will therefore be necessary to advert to some of the clauses in the act, to see whether their power does or does not enable them to include the Old Artillery Ground in the union in question.

The first fourteen sections relate to the establishment of the machinery under which the act is to be conducted, and some of the usual consequences.

The 15th section enacts, that the administration of relief to the poor according to the existing laws, or such laws as shall be in force at the time being, shall be subject to the direction and control of the commissioners; and then the section goes on to state the general power of the commissioners.

This section does not at all contemplate any exception or abridgment, as to locality, of the full powers given to the commissioners over the whole of England and Wales.

The five sections next following give general directions not applicable to the question in discussion.

The 21st section enacts that, unless in cases otherwise provided by the act, all the powers and authorities given by the act of the 22 *Geo.* 3, c. 83, which is generally called *Gilbert's* Act, and the 59 *Geo.* 3, c. 12, (*Sturges Bourne's* Act,) and every other Act of Parliament, general as well as local, relating to the poor, shall be exercised by the persons authorised by law to execute the same, under the control, and subject to the rules, orders, and regulations of the commissioners; and the commissioners, and their deputies, are authorised to attend at the parochial and local boards and vestries, and take part in the discussion, but not to vote.

This clause, therefore, in express terms gives the Poor Law Commissioners, in some cases at least, a jurisdiction over parishes governed by local acts.

The 22d section also gives some authority to the commissioners in parishes under local acts.

After three sections containing regulations not material to this question, comes the 26th section, upon which the question turns as to the power of the commissioners on the subject of this dispute. Section 26 is as follows:—

"That it shall be lawful for the said commissioners, by order under their hands and seal, to declare so many parishes as they may think fit to be united for the administration of the laws for the relief of the poor, and such parishes shall thereupon be deemed a union for such purpose; and thereupon the workhouse or workhouses of such parishes shall be for their common use; and the said commissioners may issue such rules, orders, and regulations, as they shall deem expedient for the classification of such of the poor of such united parishes, in such workhouse or workhouses, as may be relieved in any such workhouse, and such poor may be received, maintained, and employed in any such workhouse or workhouses, as if the same belonged exclusively to the parish to which such poor shall be chargeable; but notwithstanding such union and classification, each of the said parishes shall be separately chargeable with, and liable to defray the expense of its own poor, whether in or out of any such workhouse."

The language of this section is as general as possible, making no exception of any kind as to parishes or places already under unions, or under the regulation of local acts, or otherwise. It must, therefore, be so interpreted,

unless it shall appear from other parts of the act that its operation was meant to be qualified; or that, by giving the full meaning and effect to the words, it should be found to have the effect of repealing, or be inconsistent, or interfere with some prior Act of Parliament connected with the same subject, when, taking the whole of this act and other acts together, it was not so meant. And in considering how far the provisions of a later Act of Parliament may interfere with those of a previous one, we entirely concur in the opinion of Lord *Kenyon* in *Williams* v. *Pritchard* (*a*), quoted by my brother *Coleridge* in the case of the Poor Law Commissioners (*b*), that "It cannot be contended that a subsequent Act of Parliament will not control the provisions of a prior statute, if it were intended to have that operation; but there are cases in the books to shew, that where the intention of the legislature was apparent that the subsequent act should not have such an operation, there, even though the words of such statute, taken strictly and grammatically, would repeal a former act, the Courts of Law, judging for the benefit of the subject, have held that they ought not to receive such a construction."

In considering the question, how far the general and extensive provisions of an Act of Parliament are to be qualified and controlled, either by other provisions in the same act, or by enactments in other acts, the principal object and general intent of the later act, which is to be interpreted, must always be borne in mind.

The great object of this act is to obtain an improvement in the management of the poor, and the legislature seems to have thought it was likely to be obtained by a uniformity in the system in the management of them.

A perfect uniformity it seemed difficult to obtain; but it seems to have been the object of the legislature to come as near to it as could be, either by enactments to be carried into effect immediately, or at other convenient times, and the commissioners have accordingly been vested with powers to be exercised as they may see occasion; and there is no doubt but that one of the most material variations in the system of the poor laws is authorised by this section; for whereas, in former times, as for instance, in the time of Queen *Elizabeth*, the poor laws were administered by parishes, it was considered in the time of *Charles* the 2d that in large parishes it might be better done in smaller districts, and this seemed to be the prevailing opinion for a long time; but afterwards a contrary course seemed to be thought the more advisable, and the *22 Geo.* 3, c. 83, commonly called *Gilbert's* Act, was passed, which, instead of dividing the administration of the poor laws into townships or villages, (as by the Act of *Charles* the 2d,) authorised the union of entire parishes: this, however, could only be done by a certain consent; but it is to be presumed that this union of parishes was found beneficial, because, by the act in question, the commissioners are empowered of their own authority to make unions on a very extensive scale.

The 26th section having therefore, in the most general terms, authorised unions, it is now to be considered whether, considering the qualifications and exceptions to which I have before adverted, they are prevented from including in a union a parish or place which is already governed by a local act of parliament, and in which many, if not all, the powers and directions under

(*a*) 4 T. R. 2, 3. (*b*) 1 N. & P. 376; *S. C. ante*, 79.

which the general union is to be governed, and, amongst other things, a board of guardians, are already to be found; and which might, therefore, seem to render unnecessary any order of the Poor Law Commissioners as to its government.

The 28th section directs the commissioners to make inquiries as to single parishes, with a view to forming unions.

The 29th directs a similar inquiry as to former unions, either under *Gilbert's* Act or local acts, with a view to the future apportionment of expenses.

The 32d section is a very material one. The 26th having given the power to form unions, the 32d authorises the commissioners to declare any union, whether formed before or after the passing of the act, to be dissolved in any parish to be added to or separated from such union, and to adapt the constitution, management, and board of guardians, to the altered state of things; and then the parishes separated from the union may be united to other parishes or unions; and the commissioners are authorised to ascertain the proportionate value of the workhouses, and other things belonging to the parish, and it gives directions on the subject. But this alteration is not to take place unless a majority of two-thirds of the guardians of the union shall concur in the alteration; and on this it is to be observed, that the consent is only required when unions are altered, and not when originally formed under section 26.

Now this mode of ascertaining the proportion of expenses had been directed by section 28, as to single parishes, and by the 29th, as to unions, under *Gilbert's* Act and local acts; all the parishes, therefore, under the contemplation of both these sections, must be considered as being capable of forming part of the union thus authorised by the 32d section to be altered. And if unions of parishes under local acts might be made parts of a union under the act in question, so may a single parish possessing a local act.

The 37th section prohibits unions being formed under *Gilbert's* Act without the consent of the commissioners. The 38th section directs, that when parishes are formed into a union, there shall be a board of guardians, with particular directions relating to them. It is not, however, necessary to go through these particulars. One or two of the circumstances connected with unions of parishes with local boards are worthy of observation. The 26th section itself provides, that notwithstanding the union there authorised, each of the parishes shall be separately chargeable with and liable to pay the expenses of its own poor, whether relieved in or out of the workhouse. The 27th permits, that in any union, justices may direct, in certain cases, relief to persons not in the workhouse to be given, by whom the particular parish is chargeable. The relief cannot be given by the union guardians out of the union fund; therefore the parish guardians, wherever there are such, will be the persons to give this relief. Again, section 38 enacts, that the workhouses of such union shall be governed, and the relief of the poor in such union shall be administered by the board of guardians—not the out-door relief—evidently giving to the board the government only of matters wherein the parishes have a common interest. The same section makes the justices ex officio guardians of the united or common workhouses, (not of such union, nor of such parish); and further provides, that no ex officio or other guardian of any such board shall act, except as a member, and at a meeting of such board.

Now section 54 is entirely confined to the relief of the poor of any parish which has a local board under this or any other act or select vestry, and whether forming part of a union or incorporation or not, and directs that such relief shall belong exclusively to such guardians of the poor or select vestry.

Some of the provisions relating to bastardy and removal lead to similar observations, and strongly support the inference, that parishes having local boards may be united with others under the 26th section. We do not feel it necessary to discuss the judgment pronounced by us on the 39th section, though we were pressed at the bar with the consequences of it. We were told that the effect of it would be easily evaded, inasmuch as the commissioners would be at liberty to unite every parish having a local board, though not to give a board to a single parish possessing already a board under a local act. But we are not to assume that the commissioners will evade the law, or colourably unite a parish possessing a local board, merely because they have not the power to give them that constitution as single parishes. The power given by section 26 is given in different terms from that given by the 39th, and the Court has decided under different conditions. We have no right to doubt that both the one power and the other will be faithfully carried into execution. The vast and populous parishes for which local constitutions have been enacted, stand plainly in a very different condition from the small parishes which have been affected by *Gilbert's* Act, or have obtained local acts for themselves. Whether it is or is not desirable that the former should remain single, and act on their existing regulations, there are obvious reasons for supposing that parliament would have been unwilling to disturb what it found there established. But to withhold the power of uniting every small parish, otherwise fit to be united, might have had the effect of preventing the operation of the new law over a large portion of the country. We find, accordingly, (as was indeed admitted in argument at the bar,) that the power of uniting is conferred without any restriction whatever, and have pointed out several sections in which the union of such parishes is clearly contemplated. Upon the whole, therefore, we are of opinion that the commissioners have in this case exercised a lawful power, and that their order must be confirmed.

Rule discharged.

The KING *v.* The JUSTICES of DERBYSHIRE.

[For the report of this case see *ante*, p. 248.]

Sir FRANCIS BURDETT, Bart. *v.* WITHERS.

June 3d.

Assumpsit, for not keeping and leaving premises, of which the defendant was tenant, in good and sufficient repair, according to agreement. Plea, payment of 5*l.* into Court, and that the plaintiff had not sustained greater damage. *Held*, that evidence was admissible on the part of the defendant to shew what was the condition of the premises when he entered upon them.

ASSUMPSIT. The declaration stated, that whereas the defendant was tenant to the plaintiff of certain premises, upon (amongst others) the terms, that the defendant should, during the tenancy, keep all the said pre-

mises in good and sufficient repair at his own expense, the defendant in consideration thereof promised, &c. Breach, that the defendant did not keep the said premises in good and sufficient repair at his own expense; but, on the contrary thereof, that the defendant, after the commencement and during the continuance of the tenancy, wrongfully suffered and permitted the said premises to be and continue, and the same were for and during all that time, ruinous, prostrate, and in bad and untenantable repair, &c. for want of good and sufficient repairing thereof; and that the defendant afterwards wrongfully yielded up the same premises in the like ruinous and prostrate condition, &c. Plea, payment of *5l.* into Court, and that the plaintiff had not sustained greater damage.

At the trial before *Alderson*, B., at the Reading spring assizes, 1836, it appeared that at the time when the defendant yielded up the premises they were much out of repair, and that it would cost 100*l.* to put them in proper repair. The defendant then offered evidence to shew what was their condition at the commencement of his tenancy. The learned judge rejected the evidence, saying, that both the contract and the breach were admitted on the record, and that the jury had only to assess the plaintiff his damages. Verdict for plaintiff, 100*l.*

Cooper having obtained a rule nisi for a new trial, on the ground of misdirection,

Ludlow, Serjt. shewed cause. No doubt *Gutteridge* v. *Munyard* (*a*) is an authority against the plaintiff; but in the case of *Stanley* v. *Toogood* (*b*) *Tindal*, C. J. said, that, under a covenant to keep and leave premises in repair, the state of repair at the time of the demise was not to be taken into consideration. The distinction between evidence of the age and general condition, which is said to be admissible, and evidence of repair, which is certainly not admissible, is a very fine drawn distinction, and it seems unreasonable to admit the former evidence while the latter is excluded.

Lord DENMAN, C. J. (without calling upon *Cooper*).—We think it was very material for the jury to be informed of the condition of the premises at the time of the defendant entering upon them, in order that they might determine whether he had paid into Court enough to cover his liability for dilapidations.

LITTLEDALE, PATTESON and WILLIAMS, Js. concurred.

Rule absolute.

(*a*) 7 Car. & Pa. 129. (*b*) 3 Bing. N. C. 4. *S. C.* 2 Hodges, 132.

BLAND *v.* WARREN.

May 25th.

ARCHBOLD had obtained a rule nisi to set aside the trial and proceedings in this case, and for a new trial, on the ground of irregularity. The

In an action where the defendant had pleaded several special pleas, whereon issue was joined, the plaintiff gave notice of trial for the third sittings in term, but gave no notice that the case would be taken as undefended. The cause was entered in the marshal's list as undefended. No notice was given by the defendant that the cause was defended, and no counsel appeared for him when the cause was called on:—*Held*, after verdict for the plaintiff, that the plaintiff had committed no irregularity in trying the cause as undefended; but, as there was an affidavit of merits, the Court allowed a new trial on payment of costs.

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action was in assumpsit, and the defendant had pleaded several special pleas, upon which issue was joined on the 31st of March. The plaintiff gave notice of trial for the second sittings in Easter term, and the notice was continued for the third sittings, which occurred on the 5th of May. The cause was entered for trial three days before that day. The printed notice of the third sittings stated that none but undefended causes would be taken that day. The cause was entered in the marshal's list as undefended, and was so called on. No notice had been given by the plaintiff to the defendant that the cause would be taken as undefended. No counsel appeared for the defendant, and the plaintiff had a verdict.

The affidavit for the defendant stated, that the cause was set down out of its turn in the list of undefended causes; that he did not expect it would be taken as an undefended cause; that the plaintiff's attorney knew it would be defended, and that the defendant had a good defence on the merits.

The affidavit for the plaintiff denied that he knew the cause would be defended, and stated that the cause was set down in its regular way, and not out of its turn.

Humfrey now shewed cause, and contended that there had been no irregularity.

Archbold, contrà.—By the regular printed list it would not appear that this cause was to have come on on the day when it was tried; if the plaintiff intended to have taken it as an undefended cause he ought to have given two days' notice to the defendant.—[*Patteson*, J. That may be the practice when a cause is taken out of its turn, not otherwise.]—Then the necessary consequence must be, that every defendant in the list of causes must give a brief to counsel.

Lord DENMAN, C. J.—A list is made out at the marshal's office, for the last sittings in term, of all those causes which are supposed to be undefended. If a cause appears in that list, as this did, it is to be considered primâ facie as an undefended cause. Formerly the practice was to deliver a brief to counsel, in order that he might appear and state that the cause was defended. If this defendant had done so, or had given notice to the plaintiff that the cause was defended, the plaintiff would have tried it at his peril. But this case was set down as an undefended cause, and the defendant neither gave such notice, nor instructed counsel. It is true that several special pleas are placed upon the record; but that is no proof that there is any real defence. It does not appear, therefore, that the plaintiff has committed any irregularity, but as there is an affidavit of merits, the rule may be made absolute on the payment of costs.

LITTLEDALE and PATTESON, Js. concurred.

Rule absolute, on payment of costs.

SMITH *v.* DIXON.

May 22.

Declaration alleged, that the plaintiff sold to the defendant not less than 5000 nor more than 6000 trees, to be well taken up by the plaintiff at the usual and proper time of the year, and to be delivered to the defendant. The declaration then averred, that the plaintiff did well and properly take up 6000 trees (without laying the number under a videlicet, or averring that it was not less than 5000 or more than 6000) and offered to deliver them to the defendant. Plea, that the plaintiff did not well and properly take up or offer to deliver 6000 trees. On special demurrer to the plea, on the ground that the defendant had improperly made the number material, and that the plea was double, in traversing both the taking up and the offer to deliver:—*Held*,

1. As the declaration itself, by not averring that the number was within the limits prescribed by the contract, had made the number material, because, without taking the number to be material, there was no averment of performance on the part of the plaintiff, that therefore the plea was not bad for traversing the number.

2. That the plea was bad for duplicity, in traversing both the properly taking up and the offer to deliver the trees.

THE declaration stated, that the defendant bought of the plaintiff a large quantity, that is to say, not less than 5000 nor more than 6000 oak trees, being not less than two feet and a half nor more than three feet in height; and also 10,000 oak trees, being not less than one foot and a half nor more than two feet in height, the said oak trees respectively to be well taken up by the plaintiff at the usual and proper time in the year for taking up oak trees, and within a reasonable time afterwards to be delivered by the plaintiff to the defendant's order at Bishop Brigg, in the county of Lincoln. And in consideration thereof, and that the plaintiff, at the request of the defendant, then promised the defendant to take up the said oak trees, as aforesaid, and to deliver the same to him, the defendant, he, the defendant, then promised the plaintiff to accept and pay for the said oak trees. Averment, that afterwards, on the 10th day of February, in the year of our Lord 1835, the plaintiff well and properly took up for the defendant 6000 oak trees, being not less &c., and 10,000 oak trees, being not less &c.; which said 10th day of February then was the usual and proper time of the year for taking up oak trees, as aforesaid. And although the plaintiff afterwards tendered and offered to deliver the said oak trees to the defendant, yet the defendant did not accept the said oak trees; whereby the said oak trees, being so taken up, perished and became of no value to the plaintiff.

2d Plea. That the plaintiff did not well and properly take up for, or tender, or offer to deliver to the defendant, or to his order at Bishop Brigg aforesaid, 6000 oak trees, being not less &c., and 10,000 oak trees, being not less &c., in manner and form as the plaintiff hath above in his declaration in that behalf alleged, and of this he, the defendant, puts himself upon the country &c.

3d. Plea. That the said oak trees in the declaration mentioned were to be delivered by the plaintiff to the defendant's order in manner in the declaration in that behalf mentioned. And the defendant further saith, that it was the duty of the plaintiff, according to the usage and custom of trade, and according to and in compliance with the terms of the said supposed contract in the declaration mentioned, to have abstained from taking up or offering to deliver to the defendant the said oak trees, or any of them, or any part thereof, until he, the defendant, should have given to the plaintiff an express order so to do, or until a reasonable time for his, the defendant's, giving such express order should have elapsed. And the defendant further saith, that at the times of his, the plaintiff's, so taking up for and offering to deliver to the defendant the said oak trees, he, the defendant, had not given to the plaintiff an express or any order to take up or deliver the said oak trees, or any of them, or any part thereof, nor had a reasonable time for his, the defendant's so doing then elapsed; and by means of the premises in this plea mentioned the said oak trees, if he, the said defendant, had taken or accepted the same, would have been of little or no value to him, the defendant, &c.

4th Plea. That the said oak trees which he, the defendant, bargained for and bought of the plaintiff as in the declaration mentioned, were oak trees then being and growing in a certain nursery ground of the plaintiff at Market Rasen, in the county of Lincoln. And that the said oak trees which the plaintiff so took up and offered to deliver to the defendant in manner in

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the declaration in that behalf mentioned, were not the same trees which he, the defendant, had bargained for and bought of the plaintiff, as in the declaration and in this plea mentioned; nor were the said oak trees which the plaintiff so took up for and offered to deliver to the defendant as aforesaid, or any of them, or any part thereof, trees which, at the time of the said bargain and sale, were growing in the said nursery ground of the plaintiff at Market Rasen aforesaid.

Special demurrer to the above pleas.

Causes of demurrer to the 2d plea, that it is double in denying both the taking up and the tender of the oak trees, containing a negative pregnant; and traverses the allegations in the declaration too largely, in making the exact number and height of the trees material to the issue.

To the 3d plea, that it argumentatively denies the contract and promise in the declaration alleged, and admits that the plaintiff hath a good cause of action against the defendant upon another contract; that it amounts to the general issue, and does not confess and avoid the cause of action stated in the declaration.

To the 4th plea, that it argumentatively denies the contract and promise in the declaration alleged, merely amounts to the general issue, and does not confess and avoid the cause of action in the declaration alleged.

Archbold, in support of the demurrers (*a*). The second plea is bad on two grounds. 1st. It is double in denying that the plaintiff either well and properly took up or tendered to the defendant the trees in question. If the plaintiff had broken his contract in two ways, each should have been made the subject of a separate plea. In the Doctrina Placitandi, p. 136, citing Dyer, 242 a. it is said that a plea to debt on bond, that the obligation was to abide by an award, and that no award was made *or* delivered, is bad for duplicity.—[*Coleridge*, J.—May not the taking up be considered as part of the act of deliverance?]—The plea says, take up or tender. It would have been sufficient to have said he did not deliver up in manner and form, &c. 2d. The traverse taken is too large. The declaration alleges a contract for not less than 5000 nor more than 6000 trees, and the plea denies that the plaintiff delivered 6000.—[*Patteson*, J.—The declaration avers that the plaintiff well and properly took up 6000, &c. If that number is material in the declaration, why should not the defendant traverse it? If the number however is not material in the declaration, it is not in the plea.]—The plea also traverses the "well *and* properly," conjunctively instead of disjunctively. The third plea is bad, for it imports into the contract, in order to qualify the terms of it, a custom of trade. This is improper according to *Greaves* v. *Ashlin* (*b*). The fourth plea amounts to the general issue.

The COURT then asked *Wightman* whether it was his intention to support all the pleas, and allowed him until Friday, the 28th of April, to consider.

Wightman contrà (April 28th). The defendant abandons the third plea. The second and fourth pleas are good. The objections taken to the second plea are: 1st. That the traverse is too large, as it traverses the precise num-

(*a*) In Easter term last, April 25, before Lord *Denman*, C. J., *Littledale*, *Patteson*, and *Coleridge*, Js.

(*b*) 3 Campb. 426.

ber alleged to be taken up; 2d. That it tenders a sort of double issue by traversing both the taking up and delivery. As to the first objection, the number here is not immaterial. The contract, as stated in the declaration, requires the allegation of some precise number. The plaintiff has chosen to allege a number positively, and as he has done so, it was open to the defendant to traverse that number. This strictness was not necessary, the plaintiff might have alleged a number under a videlicet, and then as the precise number is not of itself material, he would not have been compelled to prove it.—[*Coleridge*, J.—Suppose this action had been brought before the new rules, and the declaration had contained an averment of a delivery of 6000, to which the general issue had been pleaded, could not the plaintiff have given in evidence delivery of 5999?]—According to the doctrine laid down by Mr. Serjt. *Williams*, in note 1 to *Dakin*'s case (*a*), where any thing that is not material is laid down without a videlicet, the party is concluded by it. He cites *Symonds* v. *Knox* (*b*). In *Arnfield* v. *Bates* (*c*), and *Crispin* v. *Williamson* (*d*) the same language is held. The present case does not require the doctrine to be carried to its full extent, because some number is material, as the averment of delivery must be qualified by alleging some number; and if the number were struck out of the declaration altogether it would be bad.—[*Patteson*, J.—I do not see why a different sense should be put on 6000 in the plea from that which the plaintiff contends that it bears in the declaration. If it only means an indefinite number in the latter, why is it to mean a definite one in the former?]—At all events, from the form of the allegation in the declaration, the defendant could not take any other traverse. *Newhall* v. *Barnard* (*e*) is an authority for the defendant. It shews that a declaration complaining of an obstruction of three lights is not answered by a plea, which justifies the obstruction of two of them only.

As to the second objection, the issue is not double; the rule has been incorrectly applied. An issue may well involve several facts, and still be a single issue; *Webb* v. *Weatherby* (*f*). The facts here alleged do, when taken together, constitute one single point upon which issue is tendered. All these facts must necessarily be involved in the issue; they would have formed part of it even had the traverse been modo et formâ. Moreover, the plaintiff himself tenders them for traverse.

The fourth plea also is good. It is in substance that the trees taken up and tendered were not the trees bought. It is said that this amounts to the general issue. But since the new rules that is not so. The general issue now has no other effect than a denial of the contract. Here the contract is admitted. (*Archbold* intimated that he objected to the plea as being argumentative.)—[*Patteson*, J.—By the fourth plea you add another term to the contract as stated in the declaration, and so aver arguendo that the contract was not the same as that stated, and then conclude with a verification.]

Wightman then abandoned the fourth plea.

Archbold contrà. The doctrine laid down in the note to *Saunders* is qua-

(*a*) 2 Wms. Saunders, 291, c.
(*b*) 3 T. R. 68.
(*c*) 3 M. & S. 173.
(*d*) 8 Taunt. 107, 112.
(*e*) Yelv. 225.
(*f*) 1 Bing. N. C. 502. *S. C.* 1 Hodges, 39.

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lified by the subsequent editors in a note on the same subject. And certainly that doctrine cannot be supported in its full extent. The substance of the averment in the declaration is, that the plaintiff tendered and offered to perform his part of the contract; the plea therefore should have traversed his having done so modo et formâ.

The principle laid down in the doctrina placitandi is conclusive as to the second objection. It has been attempted to apply the rule relative to a declaration, to the plea in this case. If in a declaration there are fifty facts, which together make one issue, the defendant cannot traverse each of these nominatim in one plea. He must either plead the general issue, or he must make each fact the subject of a distinct plea. *Webb* v. *Weatherby* (*a*) is quite beside the question. There the two facts alleged in the replication were considered by the Court to be identical, and *therefore* they held that it was not bad.—[*Coleridge*, J.—Does not the "taking up" and "delivery" here constitute one allegation only? The "taking up" alone, or "the delivery" alone, would have been quite immaterial.]

Cur. adv. vult.

Lord DENMAN, C. J. on this day delivered the judgment of the Court.—In this case the contract alleged in the declaration is, that the plaintiff sold to the defendant not less than 5000, nor more than 6000 oak trees, of a certain size; and 10,000 oak trees of another size, to be well taken up by the plaintiff, at the usual and proper time of the year, and to be delivered by him to the defendant within a reasonable time afterwards, at certain prices. The declaration then avers, that the plaintiff did well and properly take up for the defendant, at the proper time, 6000 oak trees of the one size, and 10,000 of the other, (without laying the number under a videlicet, or averring that the number of the first size was not less than 5000, or more than 6000,) and did within a reasonable time afterwards offer to deliver the said trees to the defendant.

The plea states, that the plaintiff did not well and properly take up for or offer to deliver to the defendant 6000 oak trees of the one size, and 10,000 oak trees of the other size, in manner and form as in the declaration alleged.

The plaintiff has demurred specially. The principal grounds of demurrer are, first, that the defendant has made the number material by his plea, which he had no right to do; secondly, that the plea is double, because it traverses not only the well and properly taking up, but the subsequent offer to deliver.

On the first ground, we are of opinion that the plea is good. The plaintiff has himself made the number material, by not averring that the number was within the limits prescribed by the contract. If that averment had been inserted in the declaration, the number would have been immaterial, and the question would have turned on the want of a videlicet; but as the declaration stands, it is only by taking the number stated as material, that the declaration itself can be supported; for so only is there any averment of performance of the condition precedent to take up a number of trees within the prescribed limits.

On the other ground, we are of opinion that the plea is bad. The well

(*a*) 1 Bing. N. C. 502. *S. C.* 1 Hodges, 39.

and properly taking up of trees depends on the time and manner in which it was done, and is not necessarily coupled with any subsequent offer to deliver. If the plaintiff fails to prove the well and properly taking up, the defendant would be entitled to a verdict, though there had been an offer to deliver. On the other hand, if he fails to prove the offer to deliver, the same consequence would follow, though he should establish that the trees were well and properly taken up. Formerly the plea of non assumpsit would have put in issue both facts; but now all facts intended to be denied must be specially traversed, yet not two by one traverse, as it is here. Judgment must be for the plaintiff.

Judgment for the plaintiff.

WATTS *v.* FRASER.

June 9th.

Libel. The defendant proposed to prove in mitigation of damages, that he had been provoked to write the libel complained of by other libels previously published by the plaintiff in certain newspapers and in a magazine. To effect this, he offered in evidence a certificate of an affidavit from the Stamp-office, that the plaintiff was a proprietor of one of the newspapers, and proved that he was also editor of the others, and that he had read over in MS. an article tending to provoke the defendant, which afterwards appeared in one of them. He also produced copies of the newspapers obtained from the Stamp-office, one of which corresponded with the affidavit: and proved that the others had been signed and deposited under directions of the plaintiff by his printer, and one of them was proved by the plaintiff's printer to have been printed by him. The magazine produced was also stated by the plaintiff's publisher to have been published by him, according to his belief, before the appearance of the defendant's libel.

The defendant gave no evidence to shew that he had seen any of the libels by which he alleged that he had been provoked.

Held, 1st. That the deposit of the newspapers at the Stamp-office did not, by virtue of 38 *G.* 3, c. 78, under those circumstances afford evidence of a publication. 2nd. That the publication of a newspaper could not be inferred from the circumstance of one having been printed. 3rd. That even if the publication had been proved, the evidence was inadmissible to shew provocation, unless some further evidence was given from which the jury might infer that the defendant had seen the libels by the plaintiff previous to writing the libel complained of.

LIBEL. The first count for a libel on a literary publication of the plaintiff's; the second for a libel on himself personally. Plea, the general issue. At the trial before Lord *Denman*, C. J. at the Middlesex sittings after Michaelmas term 1835, the plaintiff having proved the publication and inuendoes, the defendant proposed to shew in mitigation of damages, that the plaintiff had published various articles in several newspapers, and in a magazine edited by him, attacking the defendant, and thereby provoking him to write the libel complained of. For this purpose he offered in evidence a certificate of an affidavit from the Stamp-office, that the plaintiff was joint proprietor of the United Service Gazette, (which was said to contain one of the articles complained of,) and also a copy of that paper, which was stated to have been brought from the Stamp-office, and of which the title, printers, publishers, and place of publication corresponded with those in the affidavit. This evidence was objected to by the defendant, and rejected by Lord *Denman*, C. J. It was also proved that the plaintiff was editor of the Alfred newspaper, and of the Old England newspaper, previous to the publication of the libel for which the action was brought, and at the time when articles attacking the defendant appeared in them. Copies of those newspapers obtained from the Stamp-office, signed and deposited by the printer under the direction of the plaintiff, were then tendered in evidence. As to the Alfred, a witness was called, who stated that the plaintiff had read over to him in manuscript an article complained of and inserted therein, and employed him to print the paper. But no evidence was given to shew the publication of any paper containing the alleged libel, except by the copy deposited at the Stamp-office, nor that the defendant had seen any copy of these papers. The evidence was, for these reasons, rejected. The defendant also offered in evidence a magazine edited by the plaintiff, containing an article complained of by the defendant, the publication of which bore date previous to the libel by the defendant, and which the foreman of the pub-

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lisher stated, according to his belief, was then published. There was no evidence to shew that the defendant had seen any copy of this work, and it was also rejected. Verdict for the plaintiff on the second count.

Erle having obtained a rule nisi for a new trial, on the ground of the improper rejection of evidence,

Sir *J. Campbell*, A. G., Sir *F. Pollock*, and *Barstow*, shewed cause.—It is clear that the evidence tendered was not admissible at common law. The only question is, whether it has been rendered so by 38 *Geo.* 3, c. 78. The sections which will be relied on are sections 9, 11, and 17. In the first place, the statute being restrictive of the common law rights of parties, is not to be extended by implication beyond its necessary import. There is nothing in it which enables the defendant on the present occasion to avail himself of its provisions. The object of that statute was to facilitate proof, in cases of civil or criminal proceedings against the publisher of any papers, for matters relating to that paper only. The words of section 9 are, that the affidavits to be deposited shall be evidence of the matters set forth therein in all proceedings, civil or criminal, touching any newspaper mentioned in such affidavit. The enactment is not that they shall be evidence on all occasions, or when any question may arise respecting such newspaper collaterally, as was the case in this instance. It cannot be contended that this action was a proceeding touching the newspapers which were tendered in evidence. Therefore the certified copy of the affidavit was clearly inadmissible. Even if the original affidavit itself had been produced, that would only have shewn that at the time in question the plaintiff was a joint proprietor of the paper, which would not have answered the purpose for which it was tendered. The defendant must have gone further, and proved that the paper was actually published, and also that he afterwards read it. By section 11, the evidence to be afforded by such certified copy is extended, but only to proceedings for the recovery of penalties under the act. The other side will probably rely on the words "in case any persons shall make application to the commissioners, in order that such paper so signed by the printer or publisher *may be produced in any proceedings civil or criminal*," which occur in section 17. But these words must be referred to the cases provided for in sections 9 and 11, and the same restrictions override them; they do not in any way affect the rules of evidence applicable to such instruments when produced, but merely afford the means for producing them.

With respect to the object for which the newspapers and magazine were tendered, namely, to shew that provocation had been given by the plaintiff, it is clear that, before they were admissible for that purpose, the defendant must shew that they did effect that provocation. They certainly cannot be given in evidence merely as the act of the plaintiff without shewing the materiality of the act. Now though the circumstance that a paper is found at the Stamp-office may be sufficient to shew a publication criminally (*a*), still it is no publication from which a presumption will be raised that the defendant was provoked by it. It merely shews that a copy was sent to the Stamp-office. It does not at all follow that the defendant ever saw the copy. Had the defendant given evidence even of probability that he saw the paper,

(*a*) See *Rex* v. *Amphlit*, 4 B. & C. 35.

that he frequented a coffee-house, for instance, where it was taken in, it might have been sufficient; though in that case it would have been necessary to prove that the paper corresponded with the one he had probably seen, as in other cases of secondary evidence. But there was nothing to shew that there ever was any other copy of the paper in existence. The Court will not take judicial notice that where there is one printed copy of a paper, there probably will be others. The party must individualize the particular publication by which he represents himself to have been provoked. Suppose the defendant could have pleaded the provocation specially, and could have made profert of the paper, evidence of the existence of another copy would not have supported the plea. It cannot, therefore, be made available for that purpose under the general issue.

Erle, contrà. The principle laid down as to the reception of evidence of previous libels, both in *May* v. *Brown* (*a*) and in *Tarpley* v. *Blabey* (*b*), is in the main identical; that they are admissible if there is ground for inferring that they created the provocation which led to the publication of the libel complained of. The publication of other copies, corresponding to that deposited, will be presumed, and from the circulation of a paper it may be inferred, that the defendant saw it; as in the case of bills placarded about the streets.—[Lord *Denman*, C. J.—In *Johnson* v. *Hudson* (*c*), to which you refer, much more precise evidence was given to identify the paper complained of with that produced.]—It is submitted that sufficient was given in this case. As to the construction of s. 17, there is nothing in the title, preamble, or context of the act, to confine its operation to the cases of plaintiffs, prosecutors, or informants. It was passed for the furtherance of justice generally, that evidence might not be wanting, whenever the proprietorship of a newspaper came in question. The copy used was tendered under s. 17, in which is nothing to limit the evidence in the manner contended. There is nothing to shew that ss. 11 and 17 are to be read together. Each is perfectly independent of the other, and is alone competent distinctly to effect the object for which is was enacted. A duty is cast upon the proprietor to deposit one exemplar "*of the papers so published*" on the day of publication. It will be presumed that the printer did his duty, and that the copy deposited is a correct copy of the others which were published on that day. He who goes to the Stamp-office and finds such a copy, has a right, under s. 17, to use it as a correct copy of the papers of that day's publication. The effect is just the same as if the copy produced had been bought at the shop of the plaintiff. All the papers will be presumed to be alike. It would be extremely inconvenient to consider the Stamp-office copy as secondary evidence only. Were that so, in every case of libel the plaintiff would be obliged to prove, 1st, that parties had read the libel, then that the particular copy read was lost, then that the copy produced corresponded with it. In *Baldwin* v. *Elphinstone* (*d*), it is laid down, that "printing in a newspaper shall be intended a publication, unless it be shewn that the newspaper so printed by the defendant was suppressed, and never published."—[*Patteson*, J.—That is altogether an extra-judicial opinion. A Court of Error could have had nothing

(*a*) 3 B. & C. 113.
(*b*) 2 Bing. N. C. 437; *S. C.* 1 Hodges, 414.
(*c*) 1 Har. & Wol. 680.
(*d*) 2 W. Bl. 1037.

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to do with a question of evidence.]—In *Rex* v. *Hart* (*a*), the production of the affidavit, and a paper corresponding, was held to amount to proof of publication. Here also there was parol evidence. As to the magazine, the publication was proved by the foreman of the publisher himself. This afforded evidence to go to the jury, that the defendant had seen the articles complained of. It may be admitted, that such evidence would only raise a probability of that fact, but most of the evidence received in Courts of Justice does nothing more than raise a probability. It is not therefore to be withdrawn from the jury; it is for them to say, whether the probability is sufficiently strong to enable them to pronounce an opinion.

Cur. adv. vult.

Lord DENMAN, C. J., now delivered the judgment of the Court.—In this case a rule having been obtained for a new trial, on the ground of the improper rejection of evidence, it became necessary to consider both the nature and the object of that evidence. The object of it was to shew that the defendant published the libel complained of, in consequence of the provocation given by libels published by the plaintiff. Now it is of the essence of such evidence that it should be proved that the libels came to the knowledge of the party alleged to be provoked by them, before he published the libel complained of. In the absence of such proof, it is clear that he cannot avail himself of them. First, as to the newspapers, no other copies, save those deposited at the Stamp-office, were tendered in evidence, and there was nothing to leave to the jury from which they might infer that the contents came to the knowledge of the party. The same observations will also apply to the copy of the magazine produced, with respect to which also there was no evidence that it had been seen by the defendant, nor that any other copies were in existence. However, as to the newspapers, we do not decide upon that principle now. Before the question arrived at that stage, another objection was taken at the trial, that there was no proof even of the publication. With respect to the two first, I thought, and the Court are of the same opinion, that the circumstances of their having been deposited at the Stamp-office afforded no proof of such publication. As to the other, it was proved to have been printed by the plaintiff, and it has been argued that from the printing of one newspaper, which is a thing in its nature of circulation, that the Court will infer that others were printed, that a circulation took place, and therefore that there had been a publication. But we think, whatever the probabilities of the case may be, that we have no authority, in the absence of any proof, to draw such an inference, nor to direct a jury to assume that duplicates of the newspaper actually produced ever did make their appearance. We have been pressed with the authority of *Baldwin* v. *Elphinstone* (*b*), where the Court seem to have thought that the existence of a printed copy of a newspaper is of itself sufficient proof of a publication. But we think that to involve an inference which we cannot lawfully make. A party producing a copy may have printed it himself. That case is therefore an authority upon which we cannot safely rely, and accordingly this rule must be discharged.

Rule discharged (*c*).

(*a*) 10 East, 95. (*b*) 2 W. Bla. 1037. (*c*) See stat. 6 & 7 *Will.* 4, c. 76.

Ex parte PRATT.

May 25th.

Mandamus does not lie to the sessions to rehear an appeal, (even where the certiorari has been taken away,) on the ground that they have improperly rejected evidence which would have been decisive of the appeal.

J. J. WILLIAMS moved for a rule nisi for a mandamus to the justices of Berkshire, commanding them to enter continuances, and rehear an appeal brought by *Pratt* against a conviction under the late Game Act, (1 & 2 *Will.* 4, c. 32,) and tried at the last April Quarter Sessions for the county of Berks. The appellant had been convicted before a magistrate of trespassing in pursuit of game on lands alleged in the conviction to be the property of St. John's College, Oxford, and was not allowed at the trial to shew by evidence that the lands in question did not belong to St. John's College, as alleged.

J. J. Williams, in support of the application. The evidence was most material, and certainly ought to have been received; for the 30th section of the act, which gives the power of summary conviction in these cases, provides "that any person charged with any such trespass, shall be at liberty to prove, by way of defence, any matter which would have been a defence to an action at law for such trespass." Unless this application be granted, the appellants will be without remedy, for section 45 of the act has taken away the certiorari. In *Rex* v. *The Justices of Carnarvon* (*a*), *Holroyd*, J. observed, "If it had appeared in this case that the sessions had heard one side, and had altogether refused to hear the other, I should have thought it the same as if the case had not been heard at all, and I should then have been of opinion that this mandamus ought to issue." Here the sessions, by excluding the evidence, which would have substantiated the appellant's case, have in effect heard one side only.

Lord DENMAN, C. J.—There is no ground for the interference of this Court. The case is simply, that the sessions have committed an error in point of law, but it cannot be said that they have not heard the appeal, however wrongly they may have decided it.

LITTLEDALE and PATTESON, Js. concurred.

Rule refused.

(*a*) 4 B. & A. 86.

ANDREW BOURNE and two others *v.* The KING.

May 27th.

After a Court of competent jurisdiction has pronounced an erroneous judgment upon a prisoner convicted of felony, the Court of King's Bench will not, on error brought, either pronounce the right judgment themselves, or remit the record that such judgment may be pronounced by the Court below, but will merely reverse the erroneous judgment and discharge the prisoner.

ERROR on a judgment of the Court of Quarter Sessions for the county of Monmouth. The prisoners had been found guilty upon an indictment for burglary, and the judgment pronounced upon them was, that *Andrew Bourne* should be transported for seven years, and the other two for life. The Attorney General had joined issue on the assignment of error; but he now admitted that the judgment was erroneous, and prayed the Court either to pass the proper judgment, or to remit the record to the sessions, that they might do so.

Peacock in support of the error assigned. The only course which is open for the Court is to order the prisoners to be discharged.

Firstly. The Court below have no longer any authority, their judgment has been already pronounced. *Rex* v. *Kenworthy* (*a*) is not at variance with this position. In that case the ground upon which this Court ordered the court below to give judgment was, that no judgment at all had been previously given. In *Rex* v. *Ellis* (*b*), where a judgment had been given, which the Court held to be erroneous, they reversed it, and the party was discharged; so in *Rex* v. *Lookup* (*c*).—[*Patteson*, J.— *Rex* v. *Nichol* (*d*) is to the same effect; but there, as in *Rex* v. *Lookup*, the error was in the indictment, not in the judgment.]—In *Rex* v. *Pappineau* (*e*) it appears to have been assumed that, had the judgment been erroneous, the Court could have done nothing more than reverse it.

Secondly. This Court has no authority to pass judgment, *Rex* v. *Baker* (*f*). It is true that in *Rex* v. *Kenworthy* Lord *Tenterden* says, "That at common law, where the punishment is not discretionary, the record of an inferior court may be removed into this Court and we may pronounce judgment." That was a mere extra-judicial dictum, and moreover does not apply to cases where a judgment already given has been reversed. And here also the punishment is discretionary, because although by 7 & 8 *Geo.* 4, c. 29, the punishment of burglary is death, yet 4 *Geo.* 4, c. 48, gives a discretionary power to record the sentence only. And that discretion is vested in the court before whom the prisoner is actually tried, and must be guided by circumstances to which neither this Court nor a subsequent court of quarter sessions may be privy. The proceedings in error in civil cases are analogous to those in criminal cases. If error is brought successfully *by the defendant* on a judgment for the plaintiff in a civil suit, the only judgment that can be given is quod judicium reversetur. If by the plaintiff, the Court may also give the proper judgment. *Parker* v. *Harris* (*g*), *Baker* v. *Lade* (*h*), *Bac. Abr.* Error. (M) 2.

This judgment therefore ought merely to be reversed. Suppose error to be brought by the heir of a convict, as was done in *Rex* v. *Walcott* (*i*), there could be no other judgment. In *Rex* v. *Howse* (*j*) there was a want of joinder in error, and the prisoners were discharged. The prayer also on the part of the attorney general is only that the judgment may not be reversed.

Sir *J. Campbell*, A. G. contrà. In this case there is no error in the indictment, and the judgment not being such as the court of quarter sessions had any authority to pronounce, is a mere nullity. This case is even stronger than the case of *Rex* v. *Ellis* (*b*), where the Court had authority to transport for a certain time. Here there was no authority to transport at all. The punishment was not discretionary. The 4 *Geo.* 4, c. 48, only authorizes the recording of the sentence, instead of pronouncing it. But even if it were discretionary, there is no reason why the same court should not at a subsequent period exercise the discretion authorized. Nothing is more common than to respite the sentence of a prisoner from one assize to another. And if that

(*a*) 1 B. & C. 711.
(*b*) 5 B. & C. 395.
(*c*) 3 Bur. 1901.
(*d*) 1 B. & Ad. 21.
(*e*) 1 Str. 686.
(*f*) Carth. 6.
(*g*) 1 Salk. 262.
(*h*) Carth. 254.
(*i*) 4 Mod. 395.
(*j*) 3 N. & M. 462.

may be done by a court of oyer and terminer, there is much less objection to a subsequent sentence being pronounced by a local court, the parties constituting which remain the same. But in truth, the mitigation of the sentence is properly nothing more than an exercise of the prerogative of the crown, and is not, strictly speaking, vested in the court before which the trial takes place. The Court may therefore remit the record; none of the cases have decided that this cannot be done, because in none of them was the point ever raised; and there is no authority for saying that the prisoners may be discharged.

Or, secondly, this Court may itself pronounce the proper judgment. No analogy exists between proceedings in civil and criminal suits. Even if there did, the general rule is, that the court, which reverses the judgment, should pronounce that judgment, which the inferior court ought to have pronounced: *Com. Dig.* tit. Pleader, 3 (B 20). And there is no such distinction as has been contended for, either in reason or authority, between error by plaintiff and error by defendant; *Le Brett* v. *Papillon* (*a*). It is clear that judgment may be passed upon a record brought into this Court; *Rex* v. *Athoe* (*b*). Execution even may be awarded upon a judgment from a court below; *Rex* v. *Garside* (*c*). As to the objection founded upon the wording of the prayer for judgment, if that be improper, the Court will disregard it, and notwithstanding give the proper judgment; *Street* v. *Hopkinson* (*d*).

Peacock, in reply. Here the sessions have passed what does amount to a judgment, and if they be called on to pass another judgment there will be two records, which the Court will not permit; *Rex* v. *Walcot* (*e*). In *Rex* v. *Garside* (*c*) the Court merely awarded execution on a valid judgment, which is a very different case.—[*Patteson*, J.—The observations of Lord *Ellenborough* in *Gildart* v. *Gladstone* (*f*) seem to shake the doctrine, that a different course is to be adopted when error is brought by the defendant and when by the plaintiff.]—There is no case in which on error brought by the defendant, the Court has given, what would have been a right judgment in the court below, in favour of the plaintiff.—[*Patteson*, J. referring to an anonymous case in *Salkeld's* Reports (*g*).—When we have the record before us I do not see how we can be affected by the question as to who brought the writ of error.]—The Court is now asked, not merely to confirm the judgment, but to pronounce one upon a conviction before a court so ignorant of law as to give a judgment that is erroneous.

Lord DENMAN, C. J.—In this case a writ of error has been brought upon a judgment pronounced by a court of quarter sessions upon persons convicted of a capital crime, in respect of which, therefore, none but a capital judgment could be given. The record has been removed, the error pointed out and admitted, and it is prayed that the prisoners may be discharged. On the part of the crown it is contended, that, although the judgment is erroneous, two courses are open for this Court to adopt; either to remit the record, that the sessions may pronounce the proper judgment, or to pronounce that judgment ourselves. With regard to the first course, it is clear that we

(*a*) 4 East, 502.
(*b*) 1 Str. 553.
(*c*) 2 Ad. & E. 266.
(*d*) 2 Stra. 1055. *S. C.* Cas. temp. Hard. 345.
(*e*) 4 Mod. 395.
(*f*) 12 East, 668; and see note p. 670.
(*g*) Vol. i. p. 401.

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have no power to adopt it. I cannot say here that no judgment has been given; a judgment certainly has been given. And therefore it is not in our power to remit this record to the court of quarter sessions, in order that they may pronounce another judgment inconsistent with that already given. With regard to the second course; here again the same difficulty occurs, that a judgment has been given; otherwise we might, as in the case of *Rex* v. *Athoe* (*a*), have pronounced the proper one. As to this course also, *Rex* v. *Ellis* (*b*) appears to me a decisive authority that we have no power, where a judgment, though erroneous, has been pronounced, to pronounce the correct judgment. There is no case which can be cited to shew that we have. That case seems to me very similar to the present; it was argued by my brother *Parke*, and he never contended that this Court possessed any such power as is now attributed to it. The judgment of the Court was delivered by *Abbott*, C. J., after time taken for consideration upon the whole subject. It is true that the point was never raised in argument, but it is scarcely possible to suppose that, had such a course been available, it would have escaped the attention of such counsel and such a Court. I think therefore that the judgment which has been pronounced is conclusive, and since that judgment is erroneous, the prisoners must be discharged.

LITTLEDALE, J.—Since it is admitted that this judgment is erroneous, the only consideration left for us is, whether we have power either to remit the record to the court below, or to pronounce the right judgment ourselves. The first course is certainly improper. It was adopted in *Rex* v. *Kenworthy*, but that was because no judgment whatever had been given. But here the court of quarter sessions have given judgment, and after having exercised their authority, that authority is now exhausted. Is it then in our power to give the right judgment? It is stated in 2 *Hawk.* P. C. c. 50, s. 19, that "It is said by Sir *Edward Coke* (3 *Inst.* 2, 10 (c),) that if the judgment be erroneous, both that and the execution thereupon, and all former proceedings, shall be reversed by writ of error, but if the execution be erroneous, that only shall be reversed." This seems to imply, that our authority is limited to a simple reversal of the judgment. A distinction has been referred to as existing between the cases where error is brought by the plaintiff and where by the defendant. However, without determining whether such distinction does exist or not, respecting which the case in *East*, perhaps, may throw some doubt on former decisions, I think that the circumstances of this case almost wholly correspond with those of *Rex* v. *Ellis*, and that the Court has not any authority to pronounce a new judgment.

PATTESON, J.—The first question in this case is, whether any judgment at all has been already pronounced. If not, then *Rex* v. *Kenworthy* is an authority in point; although it certainly seems strange that there should have been a discussion in error where no judgment had ever actually been given. In effect however what was there done in sending back the case to the court of quarter sessions that the right judgment might be pronounced, does amount to a quashing of the writ of error. And in this case the Court would follow

(*a*) 1 Str. 553.
(*b*) 5 B. & C. 395.
(*c*) This reference is incorrect, as was observed by Lord *Denman*, C. J. It should be 3 Inst. c. 101, p. 210.

the same course if they were of opinion that the circumstances were the same. But here there is a judgment, and that judgment is erroneous. And we cannot treat an erroneous judgment, delivered by a court in a matter over which they have jurisdiction, as a mere nullity. If we had the power to do so in the present case no reason could be shewn why we should not exercise a like power in all conceivable cases where error is brought upon an erroneous judgment. Can we then send back the record in order that the right judgment may be pronounced by the court below? No case can be shewn where such a course has been adopted. It is true that in cases of error in the Exchequer Chamber, the record formerly was sent back to the inferior court. But that was done, not that the inferior court might *give* judgment, but only that it might *enforce* the judgment already given by the Court of Exchequer Chamber, which the latter court was without the means of doing itself.

With respect to the question whether this Court can itself pronounce the proper judgment, I should, in the absence of authority, have felt some doubt. It certainly is laid down in *Parker* v. *Harris*, that a distinction exists between the cases where error is brought by the plaintiff and by the defendant; though there is an anonymous case, p. 401 of the same reporter, where a different rule appears to be laid down. But it is not there stated by whom the error is brought, and it may have been by the plaintiff. The latter authority is cited, with approbation, by *Bayley*, J. in *Gildart* v. *Gladstone*, the judgment in which case however is not at variance with *Parker* v. *Harris*. The only question is, whether we can give the same judgment that ought to have been given. The cases which have been cited, in which no judgment had been given, are not in point, and none have been cited where, after judgment given below, that judgment has been set aside and another pronounced by this Court. Neither do the cases in *Burrow* and *Barnewell & Adolphus* apply. Because there error existed in the indictment itself; and therefore, at all events, there would be a reversal, because the indictment itself was void. Here it is the judgment alone which is erroneous. If the question had been new I should have felt some doubt. We now come however to *Rex* v. *Ellis*. It certainly was not urged in that case that this Court had the power to give the right judgment. But considering who were the parties that argued and decided that case, I feel that from the omission of all reference to the existence of any such authority, a strong presumption arises that none such does exist. (Sir *J. Campbell*, A. G. submitted to the Court, that in *Rex* v. *Ellis* the punishment was discretionary with the court before whom the prisoner was tried, which might have been felt as a reason why this Court should not give judgment; whereas in this case, as to the judgment, no discretion existed.) That certainly does create a distinction between the cases, but it is better to proceed upon the broad ground, that, wherever an erroneous judgment has actually been given, this Court possesses no power to set it aside and give the right one.

The prisoners were ordered to be discharged.

King's Bench.

DOE, on the several demises of EDWARDS, TUCKER, JELLY and others, *v.* GUNNING and others.

June 3.

1. Where, by the practice of an ecclesiastical court, the act of the court in granting probate is indorsed on the will itself, and no other record of the act is kept, the original will, so indorsed, is primary evidence to shew a person is executor.

2. An exemplification of a grant of administration de bonis non recited a previous grant cum testamento annexo of the same effects to another party:—*Held*, that one stamp of 3*l.* was sufficient.

3. In ejectment the declaration described the lands as "ten acres of land situate in the county of S." On motion in arrest of judgment, held sufficient. *Littledale*, J. dubitante.

EJECTMENT. In the declaration the land was only described as 170 acres of land situate in the county of Somerset. At the trial before *Bolland*, B. at the Spring assizes 1836, for the county of Somerset, it appeared that in 1794, one *John Higgins*, being then tenant for life of part of the lands, remainder to his daughter in tail &c., and being himself possessed in fee of the other part, created a term of 1000 years in the property, which term eventually became vested in *Grace Green*. In 1814 she died, and her will was proved in the Ecclesiastical Court at Wells, by one *Padfield*, her sole executor. In 1815 a fine was levied to bar the estate tail, and the same year an indenture was drawn between *Padfield*, executor of *Grace Green*, of the first part, *Higgins* of the second part, his daughter and her husband of the third part, and one *John Tucker* of the fourth part, purporting to be an assignment of the residue of the term to *Tucker*, but not executed by *Padfield*. In 1816 *Padfield* died, and his will was proved also in the Court at Wells by *Edwards*, his sole acting executor, one of the lessors of the plaintiff. In 1818 *Higgins* died. In 1826 *John Tucker* died, and administration, with the will annexed, was granted to *Sarah*, his widow. In 1835 *Edwards*, as executor of *Padfield*, assigned the residue of the term to her, and she died in the same year. Administration de bonis non of *John Tucker* was granted to *Robert Tucker* the second lessor of the plaintiff, and *Sarah*'s will was proved by *Jelly*, the third lessor of the plaintiff.

To prove the title of *Edwards*, the original wills of *Grace Green* and of *Padfield* were produced from the registry of the Court at Wells. Indorsed upon the former will were these words:—"Proved on the 14 August 1814, before the worshipful *J. Turner*, clerk, M. A. Surrogate &c. by the oath of *John Padfield*, the sole executor within named; effects under 2000*l.* Sealed." A similar indorsement appeared upon the latter will. It was also proved that this indorsement constituted the only act done by the Court in granting the probate, and was the only record of it. For the defendants it was objected, that the probate itself ought to have been produced, or evidence given that it was lost.

To prove the title of *Robert Tucker*, an exemplification of the letters of administration de bonis non of *John Tucker* was produced. It contained the previous grant of administration to *Sarah Tucker*, and was stamped with one stamp only of 3*l.* It was objected, that the exemplification, which contained the former grant also, ought to have had two stamps. The learned judge overruled both the objections, giving the defendant liberty to move to enter a nonsuit, and the plaintiff had a verdict on all the three demises. A rule nisi to enter a nonsuit and also to arrest the judgment, on the ground that the lands were not sufficiently described in the declaration, having been obtained:

Erle and *Fitzherbert* now shewed cause. It was not necessary in this case to produce the probate of the wills of *Grace Green* and *Padfield*. The only

object here was, to shew that *Edwards*, the lessor, had been recognized by the ecclesiastical court as the representative of *Grace Green*. The courts of common law require proof of such recognition, because the ecclesiastical courts have exclusive jurisdiction in the matter. The question then is, what is the proper proof. Now no proof can be more complete than an authentic act of the ecclesiastical court, whereby the party is so recognized. There is also a direct authority in point, *Cox* v. *Allingham* (*a*). There the Master of the Rolls admitted the probate act book of the court as evidence that certain parties were executors, although, just as in this case, the absence of the probate itself was not explained, so as to let in secondary evidence of it. Allowing for the necessary difference of circumstances, that case precisely corresponds with the present. In the diocese of Bath and Wells no probate act book is kept; but the only record of the granting probate, which it is the usage of this diocese to keep, was produced. The authority is therefore conclusive, because the manner in which the acts of the ecclesiastical courts are to be recorded rests wholly with them. *Gorton* v. *Dyson* (*b*) is to the same effect. [*Littledale*, J. That case is not quite the same, there the document was only received as secondary evidence.] With regard to the second point, there is a fallacy in the mode of stating the objection. The object of the evidence was to shew that the lessor, *Robert Tucker*, was the representative of *John Tucker*. It was not for this purpose necessary, as is suggested, to derive any title through *Sarah*. The grant of the administration to *Robert* de bonis non of *John*, was an entirely new transaction, wholly independent of the previous grant, with the will annexed, to *Sarah*. It is true, that the fact of such administration to *Sarah* appears in the exemplification, but that is mere recital. The exemplification does not of itself constitute any grant to *Sarah*. No stamp can be necessary therefore on that ground. A stamp is not necessary simply because a fact is recited. This is an exemplification of only one record, or proceeding, the grant to *Robert* de bonis non, and therefore only required one stamp of *3l. 55 Geo. 3*, c. 184, sch. part 2.

3. As to the motion in arrest of judgment, the description of the land is sufficient. When this rule was obtained *Doe* d. *Rogers* v. *Bath* (*c*) was mentioned, but it is not in point. There, no county at all was mentioned except in the margin. The lands were not laid in the declaration as being any where. It will be urged that the sheriff in this case will not know how to deliver possession. But up to the time of *Hen.* 8, no writ of possession was in existence. The degree of accuracy therefore in a writ of possession is no measure of what is required in a declaration of ejectment. Besides, the same objection might be applied to a declaration setting out ten acres being in a particular parish, the sheriff would still have no clue as to which ten acres were meant. The sheriff here is informed that the lands lie in his county, and that is sufficient, *Cottingham* v. *King* (*d*), where earlier authorities the other way are cited and overruled. *Goodtitle* v. *Walters* (*e*) is to the same effect. The lands are pointed out to the sheriff by the lessor of the plaintiff at his own peril. There might formerly have been a reason for deciding the other way, when the jury were summoned de viceneto, but that is

(*a*) 1 Jacob, 514.
(*b*) 1 B. & B. 219.
(*c*) 3 N. & M. 440.
(*d*) 1 Burr. 623.
(*e*) 4 Taunt. 671.

not applicable now, as is observed by Lord *Ellenborough* in *Ware* v. *Boydell* (*a*). [*Littledale*, J. In fines and recoveries such a description would not be held sufficient.] In personal actions the same strictness is not required. At all events the omission is cured after verdict. *Cottingham* v. *King*.

Barstow, contrà. The case of *Cox* v. *Allingham*, which is the only case in favour of the position contended for, cannot be supported. Not even a dictum to the same effect exists, and that case proceeded wholly upon a confusion by the Master of the Rolls between the two characters of administrator and executor. The difference between them consists in this, that the character of administrator is wholly created by the ordinary, he confers it upon whom he pleases. The act of the ecclesiastical court therefore constitutes the sole title of the administrator, and the proof of that act is sufficient to establish it. The executor, on the contrary, derives his title under the will, and the courts of common law will not recognize it unless the probate is either produced or its absence accounted for; *Noel* v. *Wells* (*b*), *Allen* v. *Dundas* (*c*), *Rex* v. *Barnes* (*d*). This was not done here. From reference to the report of *Cox* v. *Allingham*, it is clear that the Master of the Rolls relied on the cases cited in *Phillips* on Evidence, *Elden* v. *Reddell* (*e*), *Davis* v. *Williams* (*f*), and was not aware that those cases relate only to administrators. In *Toller* on Executors (*g*) the mode in which a probate is to be obtained is described, and how afterwards it is to become evidence. The proposition resulting from what is there laid down is, that in all cases where a party claims by or through an executor, the probate is primary evidence; and therefore no secondary evidence can be adduced until all the primary evidence is exhausted. In the same work (*h*) the difference in the case of administrators is pointed out, and in accordance with that distinction the two cases in *East* have been decided. *Hoe* v. *Nelthorpe* (*i*) and *Rex* v. *Haines* (*j*) only shew that an examined copy of the probate is secondary evidence. *Shepherd* v. *Shorthose* (*k*) is to the same effect. Suppose the case to arise on a plea of ne unques executor pleaded and oyer demanded. It is clear there that nothing but the production of the probate would be sufficient.

Secondly. The exemplification was not sufficiently stamped. The words of the act require a distinct stamp for each record or proceeding. Here there were essentially two proceedings, and the provisions of the statute cannot be evaded by putting both on the same parchment.

Lastly. The judgment in this case must be arrested on account of the insufficient description of the premises. It is not necessary to inquire what degree of certainty was required before the existence of the writ of possession. The writ exists now, and the declaration must be sufficiently certain to enable the sheriff to act. The argument on the other side is clearly inapplicable to the present state of things. No instances from the earliest times can be cited where a declaration totally without local description was held good. In *Doe* v. *Bath* (*l*), although there was a county specified in the margin of the declaration, still it was thought necessary to amend; and it seems to

(*a*) 3 M. & S. 348.
(*b*) 1 Lev. 235.
(*c*) 3 T. R. 125.
(*d*) 1 Stark. N. P. C. 243.
(*e*) 8 East, 187.
(*f*) 13 East, 232.
(*g*) pp. 34—50.
(*h*) p. 88.
(*i*) 3 Salk. 154.
(*j*) Skin. 583.
(*k*) 1 Str. 412.
(*l*) 2 N. & M. 440.

have been there conceded, that some more particular description was necessary than is afforded by mention of the county only. *Goodtitle* v. *Lammiman* (*a*), *Doe* v. *Edwards* (*b*), all shew that the parish is a material part of the description.

Cur. adv. vult (*c*).

(*a*) 2 Camp. 274.
(*b*) 6 C. & P. 208.
(*c*) See the following case.

Doe *d.* Bassett and another *v.* Mew (*d*).

EJECTMENT, tried before *Littledale*, J. at the Spring assizes 1836, for Hampshire. It being necessary to prove that one of the lessors of the plaintiff was the executor of one *Rayner*, whose will had been proved in the Ecclesiastical Court at Wells, the original will produced from the registry was tendered as the sole evidence for that purpose, no account being given of the absence of the probate. Upon the will appeared the following words:—

"19th day of September 1823. *Maria Rayner*, *William Wood* and *F. Wood*. The above-named executors were duly sworn well and faithfully to administer the goods, chattels, and credits of the above-named *William Rayner*, the testator, deceased. They further made oath, that all the goods, chattels, and credits of the said testator, at the time of his death, did not amount in value to 1000*l*. And they lastly made oath, that the contents of the paper writing hereunto annexed, and to which they have severally subscribed their names, are true. Before *J. Richards*, surrogate.

23d September 1823. Probate passed the seal, *W. Serle*.—*C. W.*"

C. W. are the initials of the deputy registrar, and the last line was written by him. *Serle* was a proctor. Similar evidence was given to that in the last case as to the practice of the Ecclesiastical Court at Wells. The evidence was here also objected to, but was received by the learned judge, who gave leave to the defendant to move to enter a nonsuit.

Butt having obtained a rule accordingly,

Erle shewed cause.

Butt contrà.

Cur. adv. vult.

Lord Denman, C. J. now delivered the judgment of the Court in both cases.

In these cases the same point arose which had been decided in the case of *Cox* v. *Allingham* (*e*) in Chancery, which was cited in the argument, and which was founded upon several earlier authorities in this Court. We think that this authority ought not to be disturbed, and therefore this rule must be discharged. In *Doe* d. *Edwards* v. *Gunning* there was another point, namely, that the exemplification was not properly stamped. It was stamped with a 3*l*. stamp only, which it was contended was insufficient, because the exemplification set forth the titles of two persons as administrators. That circumstance however was purely accidental. It was only matter of recital, and

(*d*) See the preceding case.
(*e*) 1 Jacob, 514.

King's Bench.

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therefore we do not think that the objection can prevail. There was another point also taken in arrest of judgment; which was, the omission of the want of either parish or vill in the declaration. We are of opinion, however, that this is immaterial: accordingly the rule will be discharged.

LITTLEDALE, J.—I confess that I have had doubts as to the last point, because the defendant has no opportunity of demurring to the declaration.

Rule in both cases discharged.

REX v. COZENS.

June 12.

Where several quo warranto informations, founded on the same grounds, are pending against different individuals for acting as aldermen of the same borough, the Court has no authority, on the application of one of the defendants, to stay the proceedings in his case, until after the trial of one of the other informations.

THIS was a quo warranto information against the defendant for acting as an alderman of Norwich. The prosecutor in this case was also prosecutor in similar informations against one *Brightwell*, and against other persons, on the same grounds of objection to their title.

Sir *J. Campbell*, A. G., obtained a rule for a stay of proceedings in this case until after the trial of *Rex* v. *Brightwell*.

Sir *W. W. Follett* and *Kelly* for the prosecutor offered to consent to the rule being made absolute, provided the defendant would undertake to be bound by the verdict in *Rex* v. *Brightwell*, but they refused to enter into a like undertaking on the part of the prosecutor, and cited *Doyle* v. *Anderson* (*a*) as shewing that the Court had no authority to compel the prosecutor to enter into such arrangement.

The COURT (*b*) being of that opinion the rule was discharged.

Rule discharged.

(*a*) 1 Ad. & E. 635. (*b*) Lord *Denman*, C. J.

HEAD v. BALDREY (*a*).

The declaration in assumpsit stated that defendant was indebted to plaintiff in 703*l*., and in consideration thereof and that plaintiff would sell defendant goods to the value of 534*l*., and would give him time for the payment of the said 703*l*., that defendant promised to pay said two sums by accepting a bill for their aggregate amount. It then averred delivery of the goods sold, the giving time for payment, and a tender of a bill for 1237*l*. to be accepted. Breach, that defendant would not pay the said aggregate amount by acceptance of said bill or otherwise. The 1st plea stated, that the goods sold exceeded 10*l*. in value, and that there was no note in writing of the contract, &c. as required by the Statute of Frauds. The 2nd plea, that said goods were warranted by plaintiff of a certain quality, that they were of inferior quality and of no value, and that defendant returned them within a reasonable time. On general demurrer to the pleas, because they respectively answered that part only of the declaration which related to the sale of goods, whereas they professed to answer the whole of it:—The Court *held*,

1. That each plea afforded a complete answer to the whole cause of action, by shewing a failure of part of the consideration for the defendant's promise.

2. That the Court could not pick out of the record a good cause of action, and give judgment for plaintiff, on the ground that it appeared that at the time of the promise there was a good cause of action to the amount of 703*l*.; for defendant in assumpsit can only be made chargeable for a breach of the promise laid, which promise was not to pay the 703*l*., but to fulfil a specific arrangement by accepting a bill for that sum, and for a new liability then in contemplation.

ASSUMPSIT. The declaration stated that defendant was indebted to the plaintiff in 703*l*. 4*s*. 6*d*. for goods sold and delivered, and which sum

(*c*) The report of this case, which was decided in Hilary term last, has been postponed on account of its connection with the next case.

was then due and payable; and that in consideration that the plaintiff would sell and deliver to the defendant ten sheets of wool for 534*l.* 7*s.* 11*d.*, and would give time to the defendant for the payment of the said sum of money so due and owing from the said defendant to the said plaintiff, as hereinbefore mentioned, until and upon the 25th day of October, 1834, he the defendant promised the plaintiff to pay him for the said goods, and the said sum of money so due and owing from the defendant to the plaintiff, as aforesaid, by accepting a bill of exchange, to be drawn by the plaintiff upon the defendant, and payable in three months, from the 22d July in the year aforesaid, to the order of the plaintiff, whenever he the defendant should be thereunto afterwards requested. Averments of delivery of wool, giving time, and drawing bill at three months for the sum of 1237*l.* 12*s.* 5*d.*, being the aggregate amount of the said sum of money so due and owing from the defendant to the plaintiff as aforesaid, and of the value of the wool so sold and delivered by the plaintiff to the defendant, as before mentioned; and of a request to pay the said sum of 1237*l.* 12*s.* 5*d.*, by accepting the said bill of exchange so drawn as aforesaid. Breach, that defendant would not pay the said sum of 1237*l.* 12*s.* 5*d.* by accepting the said bill as aforesaid, or otherwise.

Pleas: first, that the contract for the sale and delivery of the said sheets of wool therein mentioned, was a contract for the sale of goods for a price far exceeding the sum of 10*l.*, and that the defendant did not accept any part of the last-mentioned goods so sold, and actually receive the same, nor did he give any thing in earnest to bind the bargain, or in part-payment, nor was nor is there any note or memorandum in writing of the said bargain, made and signed by the defendant, or by his agent thereunto by him lawfully authorised.

Secondly, that at the time of making the agreement in the first count mentioned, in consideration that the defendant, at the request of the plaintiff, had promised the plaintiff to buy of him the said ten sheets of wool in the said first count mentioned, at and for the price therein also mentioned, he the plaintiff promised the defendant that the said ten sheets of wool in the first count mentioned were of the best Suffolk growth and park-fed; and thereupon the defendant, confiding in the said promise of the plaintiff, did afterwards buy of the plaintiff the said ten sheets of wool, as and for such wool as aforesaid; nevertheless, though the plaintiff afterwards delivered the said ten sheets of wool to the defendant, yet the plaintiff did not perform or regard his said promise so by him made as aforesaid, but deceived and defrauded the defendant in this, to wit, that the said ten sheets of wool were not of the best Suffolk growth and park-fed, whereby the said ten sheets of wool became and were of no use or value to the defendant. Averment, that afterwards, and within a reasonable time, to wit, two days next after the delivery of the said wool, as in the said first count mentioned, and as soon as he the defendant discovered the same was not of the best Suffolk growth and park-fed, he the defendant returned the said ten sheets of wool to the plaintiff, for the cause aforesaid.

To the above pleas the plaintiff demurred generally, and stated the following matter of law to be argued. That although the defendant in his said pleas professed to answer the whole cause of action in the first count mentioned, yet the defendant answers a part only of the said cause of action in that count mentioned. Joinder in demurrer.

Kelly, in support of the demurrer (*a*).—The first plea is, that the contract, which relates to the sale of goods above the value of 10*l.*, is not in writing, and that it is consequently within the 17th section of the Statute of Frauds. But there is no authority for saying, that, where a contract is not a mere contract for the sale of goods, but embodies other provisions as part of the contract, it is within the statute. Here it is admitted that defendant was previously indebted to plaintiff in more than 700*l.*, which sum was then payable. The consideration for the promise was twofold; namely, the sale of more wool, and the giving time to the defendant to make the aggregate payment by a bill of exchange. The object of the Statute of Frauds, which was to protect persons from being made liable on mere words, does not apply to the present case; but, supposing the contract for the wool is void by the statute, enough remains to maintain an action for the 703*l.* 4*s.* 6*d.* The plea merely says the contract for the wool was not in writing, and leaves, as it stood before, the liability to pay the prior debt; for although there has been an agreement to give a bill of exchange, still, as that bill has not been given, an action now lies on the original consideration. The Court will look to the whole record and do justice on it. In *Le Bret* v. *Papillon* (*b*), Lord *Ellenborough* says, the Court may and ought, ex officio, to give such judgment on the whole record as ought to be given, without regard to the issues, or to any imperfection in the prayer of judgment made on either side; and *Charnley* v. *Winstanley* (*c*) is a confirmation of this doctrine.

Both the pleas are bad. The second plea refers only to the wool; it does not deny the prior contract, and clearly cannot be maintained. A contract existed for payment of money already due, and then the plaintiff enters into a warranty to deliver wool of a certain quality. The alleged breach of warranty must be the subject of a cross-action, and affords no answer to this action. A breach of warranty can only be set up where performance of the warranty by the plaintiff is a condition precedent to the performance of the contract by the defendant; and, in order to constitute a good defence, the breach must go in defeasance of the whole demand. Suppose a man to sell two horses, and to warrant them both, and that the warrants fail as to one, can he not maintain an action for the price of the other? So here there are two distinct contracts, and it cannot be contended, because there is an infirmity in one of them, that therefore an action cannot be maintained upon the other.

W. H. Watson, contrà.—The promise contained in the first count of the declaration is to pay for the wool and the debt therein mentioned, by accepting a bill of exchange. This promise is indivisible. Part of the promise is void by the Statute of Frauds, and the whole therefore necessarily falls to the ground. The promise being entire, and part of it being void, the whole is defective; so that the plaintiff cannot recover on that portion of it which need not be in writing; *Lord Lexington* v. *Clarke* (*d*), *Chater* v. *Beckett* (*e*). In *Thomas* v. *Williams* (*f*), Lord *Tenterden* says, "the two cases of *Lexington* v. *Clarke*, and *Chater* v. *Beckett*, are authorities in point directly against the

(*a*) On the 24th of January, in Hilary term last, before Lord *Denman*, C. J., *Littledale*, and *Williams*, Js.
(*b*) 4 East, 502.
(*c*) 5 East, 266.
(*d*) 2 Ventr. 223.
(*e*) 7 T. R. 201.
(*f*) 10 B. & C. 664.

plaintiff. In each of them the promise was as to a part held not to be within the statute, and as to a part to be within the statute. But it was held that the promises were entire, and that being in their commencement void in part, they were void altogether." In *Wood* v. *Benson* (*a*), which was an action on a guarantie, part of which was void for want of consideration, *Bayley*, B. says, that the same objection (as in *Thomas* v. *Williams*) would have applied to the first count of the declaration, and would have been fatal, if there had not been a good count on which the subsequent supply could have been recovered. *Charnley* v. *Winstanley* arose after verdict. The second plea is, as to the quality of the wool, and that such warranty was part of the consideration for the promise; the whole consideration must always be stated. Again, the plea here sets out the warranty and the breach of it, and then states, that within a reasonable time the defendant returned the wool. The rule is, that where a commodity in bulk is warranted, and the commodity does not answer to the warranty, the contract is annulled if the commodity is returned; *Street* v. *Blay* (*b*).

Kelly, in reply.—The breach of the alleged warranty is no answer to the claim, for the warranty related to a specific chattel in esse at the time of the contract. With regard to the first plea, it is not supported by any of the cases cited, because in this case, at the time when the contract was entered into which is said to be void, there was a prior demand subsisting on the part of the plaintiff, which is set out in the declaration, and discloses in itself an unexceptionable cause of action. The Court has never hesitated, where a promise is good as to part, and bad as to the other part, to sever the promise, whenever, as in this instance, it is capable of severance.

Cur. adv. vult.

Lord DENMAN, C. J., in Hilary term, delivered the judgment of the Court. His lordship stated the pleadings, and then proceeded as follows:—The point stated and argued was, that the special pleas afforded no answer to the whole declaration, but only to that part which proceeded on the second sale. We are clearly of opinion that each plea is in itself good, and affords a complete answer to the plaintiff's cause of action, by shewing the failure of a part of the consideration for the promise laid; *Chater* v. *Beckett* (*c*), *Thomas* v. *Williams* (*d*).

The demurrer is founded on the principle, that however irregular the mode of pleading may be, the Court will look to the whole record, and give judgment according to the truth there disclosed: *Le Bret* v. *Papillon* (*e*), *Charnley* v. *Winstanley* (*f*); and applying that principle to this case, the plaintiff contends that a good cause of action is sufficiently stated in his declaration, and not affected by the plea. For though the promise to pay by accepting a bill cannot be enforced, because the consideration for it is partially bad in law; a good consideration and a good cause of action, to the amount of 703*l.*, the price of the wool previously sold, clearly existed when the promise was made, the declaration shewing that the old debt still re-

(*a*) 2 C. & J. 94.
(*b*) 2 B. & Ad. 456.
(*c*) 7 T. R. 201.
(*d*) 10 B. & C. 664.
(*e*) 4 East, 502.
(*f*) 5 East, 266.

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mained unpaid, for the defendant would not accept the bill for the entire sum, nor pay for the same, or any part of it.

But in this action of assumpsit we apprehend that the defendant can only be made chargeable for a breach of the promise laid; and that promise is, not to pay for these or any other goods sold, but to fulfil a specific arrangement between the parties; that is, to pay by accepting a bill in respect of this liability, and a new one then in contemplation. On this point we are of opinion, that the two cases last mentioned cannot assist the plaintiff, as they go no farther than to call upon the Court to give such judgment as the law requires upon the whole record, with respect to the cause of action there stated. The Court cannot pick out of various parts of the record a different cause of action from that for which the plaintiff proceeds; and indeed, if it could, the present record would be imperfect, being in assumpsit, but containing no promise to pay for the goods which are stated to have been delivered, and to be still unpaid for. No decision has hitherto approached such a conclusion; nor can we permit a plaintiff to recover in a form of action, the very foundation of which is wanting. Judgment must therefore be for the defendant on this demurrer.

Judgment for the defendant.

MECHELEN *v.* WALLACE.

May 26th.

Declaration stated, in consideration that plaintiff would take possession of a house belonging to the defendant, partly furnished, and would, so soon as it should be completely furnished by the defendant, become tenant thereof to him at a certain rent, that defendant promised to furnish the house completely: it then averred that plaintiff had taken possession, and was willing to become tenant, but that defendant refused to furnish as aforesaid. A plea that the contract was an entire contract respecting interest in lands, and that there was no note of it in writing, was held good on special demurrer.

ASSUMPSIT. The declaration stated, that at the time of making the promise of the defendant hereinafter mentioned, the defendant was possessed of a certain house and premises in part furnished, and was desirous that the plaintiff should take and hire at a certain rent, to wit &c., the same house and premises, with the said furniture, and all other furniture necessary for the completely furnishing the same; and thereupon, to wit, on the 14th day of May, 1835, in consideration that the plaintiff, at the request of the defendant, would take possession of the same house and premises so partly furnished, and would, if the furniture necessary for the completely furnishing the said house and premises should be sent into the said house and premises by the defendant within a reasonable time, become the tenant to the defendant of the house and premises, with all the furniture aforesaid, at the rent aforesaid, and pay the said rent quarterly &c., defendant promised plaintiff that she, defendant, would, within a reasonable time after the plaintiff should have so taken possession of the same house and premises, send into said house and premises all the furniture necessary for the completing of the furnishing of the said house with furniture of good quality, to wit &c.; and thereupon plaintiff, relying on the said promise of the defendant, did, to wit, on the day and year last aforesaid, at the request of the defendant, take possession of said house and premises, so partly furnished as aforesaid, and remained in possession of said house and premises until the expiration of such reasonable time as aforesaid, to wit &c.; and although the plaintiff would have become tenant as aforesaid, and paid rent as aforesaid, if defendant would have sent in such furniture as aforesaid within such reasonable time as aforesaid; and although such reasonable time elapsed long before the commencement of this suit, and although plaintiff during such reasonable time, to wit, on &c., requested defendant to send in such furniture as aforesaid; and

although defendant did during such reasonable time, to wit, on &c., send into said house and premises divers articles of furniture, yet defendant has disregarded her promise in this, that the articles so sent in were not furniture of good quality &c.; but, on the contrary thereof, were furniture of very bad quality, worn out and unfit &c. And said defendant has further disregarded her said promise in this, to wit, that she did not nor would, within such reasonable time as aforesaid, send into the said house and premises all the furniture necessary for the completing of the furnishing of the said house and premises as aforesaid; but on the contrary thereof wholly neglected and refused so to do, and a great part, to wit, three-fourths of the furniture necessary for the completing the furnishing of the said house and premises as aforesaid never was sent into the said house and premises; by means whereof the house and premises were and remained insufficiently furnished and unfit, &c.

Pleas: That the promise in the said declaration mentioned was and is part and parcel of a contract made by and between said plaintiff and said defendant, concerning the said tenement and the interest relating to the same, as in the said declaration appears. And said defendant further says, that neither the said contract nor any memorandum or note thereof was or is in writing signed by defendant, or any person thereunto by her lawfully authorised.

Special demurrer, and joinder thereon.

Points of demurrer stated as the points intended to be argued, were, that the plea was ill in substance, because the *promise* declared on is not a contract or sale of lands, tenements, hereditaments, or any interest in or concerning them within the fourth section of the Statute of Frauds; and that the contract, which is the *consideration* of that promise, if within the statute, is not void for want of writing, but may be a good consideration, though an action might not have lain on it.

J. Henderson in support of the demurrer. The promise declared upon relates to personal chattels only, namely, to furniture to be supplied by the plaintiff. It is admitted, that a promise is void by the fourth section of the statute, where it is an entire promise, and relates to several things, some of which are within the statute, and others are not so; but in this case the promise is confined entirely to matter not within the statute. In *The Earl of Falmouth* v. *Thomas* (*a*), *Chater* v. *Becket* (*b*), and *Thomas* v. *Williams* (*c*), the promises were entire. Where however the promise is divisible, so that the valid part of it may be separated from the void part, there the whole promise is not invalidated by the statute. This distinction is confirmed by the judgment of *Bayley*, B. in *Wood* v. *Benson* (*d*), where it is observed by the Court, that the two last cases might perhaps be rested on the ground of variance, because the promise declared upon, being entire, was not sustained in that part of it which ought to have been evidenced by writing under the statute. In *Mayfield* v. *Wadsley* (*e*) *Littledale*, J. differed from the other judges as to the plaintiff's right to recover both for the growing crops and the dead stock, yet they were unanimous in giving effect to that part of the agreement which related to the dead stock, although it might be objected that the dead stock

(*a*) 1 C. & M. 89.
(*b*) 7 T. R. 201.
(*c*) 10 B. & C. 664.
(*d*) 2 C. & J. 94.
(*e*) 3 B. & C. 357.

was incident to the land, just as much as the furniture is incident to the house in this case.

The promise with which the defendant is charged is merely to supply furniture; the *promise* therefore has nothing to do with lands. The *consideration* for the promise, that is, the taking the house by the plaintiff, certainly does relate to lands, but the statute does not require the consideration to be in writing. That part of the statute which has been construed in *Wain* v. *Warlters* (*a*), and other cases, to require the consideration for a promise to be in writing, was so construed on account of the peculiar force of the word *agreement*: *Egerton* v. *Matthews and another* (*b*); where the same construction is held not to apply to a *contract* for the sale of goods under the 17th section. Now "contract," and not "agreement," is the word used in the 4th section respecting the sale of lands.

Although that part of the contract which relates to the tenancy of the house could not, for want of a written memorandum of its terms, have been enforced by action, yet, as it has already been executed, it forms a good consideration, and moreover, no objection to it as a consideration has been taken by the pleadings.

Maule (with whom was *Boyle*) contrà. In *Mayfield* v. *Wadsley* (*c*) there were in fact two distinct agreements entered into, at two distinct times, the one as to the wheat, and the other as to the dead stock. Can it be said here that there was one agreement that the plaintiff should become tenant of the defendant's house, and another that the plaintiff should send in furniture to the same house? This very contract has already been adjudicated upon in *Mechelen* v. *Wallace* (*d*), and treated as one indivisible contract. In that case the defendant's right to distrain was denied by the Court, because she had not fulfilled her promise of sending in good furniture, which was held to be a condition precedent to the commencement of the tenancy. What would be the use of sending furniture to this house, if the house was not to be occupied by the plaintiff as tenant? This case resembles *Bird* v. *Higginson* (*e*), where a parol demise of a house and an incorporeal hereditament was considered entire, and therefore void. (He was then stopped by the Court.) [Lord *Denman*, C. J. mentioned *Head* v. *Baldrey* (*f*).]

Henderson, in reply. The former case of *Mechelen* v. *Wallace* decides simply that no tenancy had been commenced by the plaintiff so as to justify distress upon him; that is quite consistent with the present argument for the plaintiff, that the declaration does not disclose any contract for letting the house, which could be enforced against the defendant.

Lord DENMAN, C. J.—The bare statement of this case shews it to be within the statute.

LITTLEDALE, J.—This is an entire contract for the house and furniture

(*a*) 5 East, 10.
(*b*) 6 East, 307.
(*c*) 3 B. & C. 357.
(*d*) 6 N. & M. 316.
(*e*) 2 Ad. & El. 696. *S. C.* 1 Har. & Wol. 61.
(*f*) *Ante*, 464.

together. It is an executory contract relating to land, and is therefore within the statute.

PATTESON, J.—The statute requires that every contract respecting an interest in land should be evidenced by writing. In this case there certainly was a contract respecting an interest in lands, which cannot be the less within the statute because it was not binding, for it is the statute itself which invalidates it.

Judgment for the defendant.

(*a*) *Williams*, J. was in the Bail Court for *Coleridge*, J., who was absent from illness.

Ex parte LEE.

During the progress of 5 & 6 *Will.* 4, c. 76 (the Municipal Reform Act) through parliament, a party was appointed town-clerk in a borough, where, by prescriptive usage, that office was held for life. Upon his removal immediately after the act passed, his claim for compensation under s. 66, was rejected by the town-council, and also upon appeal by the Treasury.

Held, that he was only entitled to nominal compensation, and a mandamus to the council to assess compensation was refused.

Quære, whether the Court of King's Bench has authority to revise what has been done by the Lords of the Treasury under the provisions of 5 & 6 *Will.* 4, c. 76, s. 66.

MANNING, on the last day of Easter term, moved for a rule calling upon the mayor, aldermen, and burgesses of Lyme Regis, to shew cause why a mandamus should not issue, commanding them to assess an adequate compensation to be paid to *H. T. Lee* out of the borough fund, for the salary, fees and emoluments of the office of town clerk of that borough. From the affidavit of Mr. *Lee*, it appeared, that, previous to August, 1835, and during the life of *Smith*, the late town clerk, *Lee* had frequently discharged the duties of the office for him, and it was generally understood that he would succeed *Smith*.

Smith died on the 21st of August, 1835, and on the 31st of August, 1835, *Lee* was appointed his successor. The office, by the terms of the charter, was to be held during good behaviour, but by prescriptive usage was held during life, and was stated so to be held by the report of the commissioners on municipal corporations.

On the 9th of September, 1835, the Municipal Corporation Act, 5 & 6 *W.* 4, c. 76, passed; s. 66 of which provides that compensation shall be given to officers on their removal.

On the 10th of September, 1835, by a treasury minute, the Lords of the Treasury declared that they thought that the principle adopted in 1 *W.* 4, c. 58, for securing compensation to officers in the Courts of Law, upon the abolition of their offices, might fairly be applied to the cases of town clerks, and that they were of opinion that in all cases where such officer held his office for life, or where the usage had been such as to raise a just expectation that the office should continue for the life of the holder, a compensation of not less than two-thirds of his profits might be granted to such officer, estimated and calculated as therein mentioned.

On the 1st of January, 1836, *Waring* was appointed town-clerk in place of *Lee*.

In June, 1836, *Lee* presented his claim for compensation to the council, calculated upon the scale suggested in the treasury minute; to which he received a reply, that the council did not consider themselves justified in awarding any compensation, unless under direction of the Lords of the Treasury.

He afterwards addressed a memorial to the treasury, and received from

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them an answer communicating the proceedings at their sitting, and intimating that they considered he was entitled to no compensation, on the ground that the Municipal Reform Act having long been before the legislature and the public, having passed the Commons, and been read a second time by the Lords, at the time Mr. *Lee* was appointed, he could not entertain any reasonable expectation of the permanency of his office.

To a second application, he received an answer, that the Lords of the Treasury saw no reason to alter their former decision.

Manning, in support of the application.—There can be no doubt that *Lee* was entitled to some compensation for his dismissal from office. It became therefore the duty of the mayor &c., upon application, to assess the amount of such compensation. They have not done so. They have refused to determine on his claim; and as six months have now closed since his application, that amounts, by s. 66, to an admission of his claim. The act gives an appeal to the Treasury in cases only where something has been done in the first instance by the mayor and corporation, with which the party claiming is dissatisfied; and here nothing has been done by them. The Treasury therefore have no jurisdiction in the case; and the council having refused to perform a duty which it was incumbent upon them under the act to fulfil, the party injured has no other remedy than by mandamus. This Court, therefore, acting upon the principle upon which a mandamus is always granted, will grant one here in the terms prayed for.

If, however, the Court should be of opinion that the Treasury has jurisdiction, then, since *Lee* is entitled under the express words of the act, and the Treasury minute in pursuance of it, to some compensation, and the Treasury have refused to assist him in procuring it, the Court will grant a mandamus to the Lords of the Treasury, commanding them to make such order as shall be just in the matter. The compensation claimed is calculated in the manner suggested in the Treasury minute, and no objection has been ever raised either to the grounds or to the result of that calculation.

Cur. adv. vult.

Lord DENMAN, C. J., this term delivered the judgment of the Court.

In this case, Mr. *Manning* moved for a mandamus to assess compensation to Mr. *Lee*, the late town-clerk of the borough of Lyme Regis, for his removal from that office. Mr. *Lee*, in the first instance, applied to the town-council; they refused to accede to his application. He then appealed to the Lords of the Treasury, who are of opinion, after consideration, that the town-council have rightly decided. Mr. *Lee* was only appointed to the office of town-clerk on the 31st of August, 1835, a little before the Municipal Reform Act passed. If any thing called upon us to grant a mandamus, it could only be to assess the lowest possible compensation; because, under the circumstances, no real loss has been sustained. Mr. *Lee* must have known, when he was appointed, that his appointment would very soon cease. And we are not bound to grant a mandamus when the result of it would be purely nominal. But in this case, moreover, we are satisfied that the town-council and the Lords of the Treasury have done right.

We do not now enter into the question, whether we have authority to revise what may have been done by the Lords of the Treasury.

Rule refused.

De Rutzen and Wife *v.* Lloyd.

June 9th.

A plaintiff having obtained a verdict, the defendant obtained a rule nisi to enter a nonsuit or for a new trial: this rule was discharged as to the nonsuit, but as to the new trial made absolute. The rule made no mention of costs. The plaintiff drew up and served the rule, upon which the defendant wrote to say that he should not avail himself of it: —*Held*, that the plaintiff was entitled to the costs of the first trial.

THE plaintiff in this case having obtained a verdict at the trial before *Gurney*, B. at the Spring Assizes for Pembrokeshire, 1834, the defendant subsequently obtained a rule nisi to enter a nonsuit, or for a new trial. In Trinity term 1836, the rule was discharged as to the nonsuit, but made absolute as to the new trial. The rule made no mention as to costs. The rule was drawn up by the plaintiff's attorney and served upon the defendant's attorney, who a few days afterwards wrote to the plaintiff's attorney, informing him that the defendant would not avail himself of the privilege granted by the Court of a new trial. Upon which, in Michaelmas term, a rule nisi was obtained to discharge the rule obtained, and for delivery of the postea to the plaintiff, with liberty to him to sign judgment and tax his costs upon it.

E. V. Williams now shewed cause.—After a rule for a new trial has been once made absolute, the party succeeding in the first trial is not entitled to costs. The Rule Hilary 2 *Will.* 4, No. 64, is conclusive as to this point; and it applies to a stronger case than the present, because he is not entitled to them even after succeeding a second time. The words are, "*though* he succeed on the second." Here the party successful on the first trial has not succeeded on the second. Suppose a new trial to have been had, and the plaintiff to have again succeeded, he would not have had to pay less,—he might have had to pay more than it is now contended he ought to pay, and he is spared the risk of a second trial. There can be no ground for mulcting the defendants in these costs, because he has conferred an advantage upon the plaintiff. The only consequence of the defendant's conduct is to place the plaintiff in the same situation as if he had succeeded on the second trial. Had the defendant done much more than he has done here,—had he withdrawn his plea and suffered judgment to go by default, instead of going a second time to trial, still he would not have been liable for the costs of the first; *Peacock* v. *Harris* (*a*). If a new trial had been had, the communication from the defendant's attorney might perhaps have been used as an admission, but it cannot be available as a ground to prevail on the Court to rescind their deliberate act in granting a new trial, whereby the plaintiff lost all title to the costs of the first.

Creswell, contrà.—The Rule Hilary 2 *Will.* 4, does nothing more than establish generally what was always the practice in this Court. The authorities, therefore, decided before that rule are conclusive on the present occasion; and among them there are three, the circumstances of which were analogous to the present, and which shew conclusively that the plaintiff is

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entitled to the costs of the trial; *Booth* v. *Atherton* (*a*), *Robertson* v. *Liddell* (*b*), *Jackson* v. *Hallam* (*c*). The cases of *Hankey* v. *Smith* (*d*), *Smith* v. *Haile* (*e*), and *Bird* v. *Appleton* (*f*), only shew, that if a new trial is actually had, the plaintiff is not entitled to the costs of the first. That principle is not impugned here. In *Elvin* v. *Drummond* (*g*), the Court thought that the parties had constituted the prothonotary arbitrator between them, and therefore refused to interfere with his decision. In *Peacock* v. *Harris* (*h*), the circumstances were quite different; there had been notice of trial, and the Court considered that as equivalent to an actual trial. In this case the result of what has been done by the defendant is to place both parties exactly on the same footing as if no rule had ever been obtained. The plaintiff is therefore entitled to the costs.

Lord DENMAN, C. J.—My first impression certainly was, that the defendant having abandoned his rule, thereby placed all things in the same position as if he had never obtained one. I admit that my mind has since fluctuated, for it seems hard that the defendant should be placed in a worse situation, because he has refrained from putting the plaintiff to further risk, vexation, and expense. Nor does the case of *Peacock* v. *Harris* seem very distinguishable from the present. Upon the whole, however, as the rule in this case was drawn up and served by the plaintiff, and was immediately abandoned by the defendant, I think that we must consider the effect the same as if no rule had been granted. The result of the cases seem to shew, that where such has been the conduct of the defendant, it must be supposed that he succeeded on grounds which he afterwards finds did not entitle him to success.

LITTLEDALE, J.—Had the defendant in this case never applied to the Court at all, the plaintiff would unquestionably have been entitled to the costs of the first trial. How then can it be said that an application which is withdrawn as soon as it is succeeded in, can place the plaintiff in a worse condition than if no application at all had ever been made. In *Peacock* v. *Harris* the circumstances were altogether different. The record there had assumed quite a new position; notice of trial had been given, and the parties had prepared for it. That case, therefore, does not apply. I think, in consequence of what has here taken place, all things are in the same condition as if no rule had been obtained. This rule, therefore, must be made absolute.

PATTESON, J.—The rule in this case was the defendant's rule; it was or him therefore to have drawn it up; and if neither he nor the plaintiff had done so, the plaintiff would no doubt have been entitled to the costs of the first trial. Here, however, the plaintiff being anxious to come to an end of litigation, draws up and serves the rule. The defendant refuses to avail himself of it. Still, as it has been drawn up and served, it cannot be disposed of without the aid of the Court. My mind also somewhat fluctuated

(*a*) 6 T. R. 144.
(*b*) 10 East, 417.
(*c*) 2 B. & A. 317.
(*d*) 3 T. R. 507.
(*e*) 6 T. R. 71.
(*f*) 1 East, 111.
(*g*) 4 Bing. 415.
(*h*) 1 N. & P. 340; *S. C.* 2 Har. & Wol. 281, but not *S. P.*

during the course of the argument. But when I consider what had taken place, I cannot discover any reason why, on account of the act of the plaintiff in drawing up the rule, he should be in a worse, or the defendant in a better situation than if the rule had never been drawn up at all. *Peacock* v. *Harris* differs very materially from this case. There the defendant himself drew up the rule; it was acted on, and a new notice of trial was given. It is true that the defendant there afterwards withdrew his plea, but that was done in pursuance of an application for favour. It cannot therefore be supposed that the defendant meant to give the plaintiff any advantage beyond what he was strictly entitled to. *Robertson* v. *Liddell* was decided on a different principle; there the new trial was abandoned by agreement between the parties. *Jackson* v. *Hallam*, where the defendant, instead of going to trial, gave the plaintiff a cognovit, does seem rather contradictory to *Peacock* v. *Harris*.

In this case I consider what was done by the defendant as amounting to a repudiation of his own previous act in obtaining the rule.

WILLIAMS, J.—As the plaintiff in this case, if he had gone again to trial, could not have obtained the costs of the first trial, I own that at first it seemed to me hard that the defendant should, by yielding at once, place himself in a worse condition than by persisting in a vexatious resistance. However, if he had not applied at all, things would never have been disturbed from their ordinary course, and the plaintiff would necessarily have had his costs; and I now think that his subsequent conduct operates as an abandonment of his rule, which being so, all things are restored to their original position.

Rule absolute, with no costs on either side, either of this or of the previous rule.

DOE *d.* VERNON *v.* ROE.

May 25th.

A defendant in ejectment, before he had appeared, obtained an order for particulars, and subsequently an order for ten days time, after delivery of the particulars, to plead, on the terms of pleading issueably and taking short notice of trial. Four terms having elapsed before the delivery of particulars, the defendant was held, notwithstanding the indulgence granted him, intitled to a term's notice of any further proceedings on the part of the plaintiff; and the plaintiff having, after the expiration of four terms, signed judgment for want of a plea, the judgment was set aside, but without costs, as the defendant had not appeared, and the nominal party was therefore still defendant on the record.

WHATELEY had obtained a rule nisi to set aside an order of *Williams*, J. in this case, made under the following circumstances:—

On 25th May, 1835, the declaration had been served on *Richards*, the tenant in possession, to appear in Trinity term following.

On 15th June, *Richards* obtained an order for particulars.

On 30th June an order was obtained by consent for ten days time to plead after delivery of particulars, pleading issuably, and taking short notice of trial.

On 2d February, 1837, particulars were delivered, but received conditionally; *Richards'* attorney claiming a term's notice before a further step was taken in the cause, a year having elapsed since the last.

On 15th February, no plea having been pleaded, judgment was signed.

On 20th February, *Williams*, J. made an order to set aside this judgment as irregular, with costs.

J. Bayley now shewed cause.—No objection can be taken to the appear-

ance by *Richards* on the present occasion. He is the party who must have become defendant in the action, and the judgment, though not formally, is virtually against him.

Then, according to the general rule, he was entitled to a term's notice. There are only two exceptions to that rule, where the stay has been by injunction or by request (*a*). The circumstances of this case do not fall within either exception. Nothing has been done by *Richards* to waive his right to notice; on the contrary, he expressly retained it. The delay which has been created was wholly caused by the plaintiff.—[Lord *Denman*, C. J.—Can you keep your order for costs?]—*Richards* has throughout been treated as the defendant.

Whateley, contrà.—The conduct of *Richards* has been such as to bring this case within the second exception. The application for particulars, and the obtaining the ten days' time, amount to a stay of proceedings at the request of the defendant; *Richards* v. *Harris* (*b*). Besides, the only ground for the rule is to prevent a surprise on the defendant by proceeding in an action apparently abandoned. There was nothing to lead *Richards* to suppose that this action was abandoned. The order as to costs is clearly bad; *Goodright* v. *Badtitle* (*c*). The only person before the Court is *Richard Roe*.

Lord DENMAN, C. J.—Nothing has occurred in this case to deprive the tenant of his right to a term's notice. But the case cited determines that he is not entitled to costs.

LITTLEDALE, J.—This judgment was irregularly signed. Strictly speaking, *Richards* had no right to take out the summons for particulars, although it was perhaps reasonable that he should be allowed to have them. The order for particulars having been obtained, that amounted to a stay of proceedings, and it was by the plaintiff's own default that they were not sooner delivered. The cause of the delay was his. However, had the defendant accepted them without a protest, that would have amounted to a waiver of his right. But here nothing seems to have been done on either side to take the case out of the general rule. With regard to costs, *Richards* can have no right to them until he has appeared in the cause.

PATTESON, J. concurred.

Rule absolute to set aside so much of the order as gave costs, discharged as to the rest.

(*a*) Tidd's Prac. 468. (*b*) 3 East, 1. (*c*) 2 W. Bl. 763.

DOE *d.* SHERIFF and others *v.* COULTHRED and BALDREY.

May 29th.

Lands were devised to trustees to sell absolutely and invest the proceeds in other lands to be held by them, in trust to permit *W. B. D.* to receive the rents and profits during his life, remainder over.

The trustees did not sell, but permitted *W. B. D.* to receive the rents and profits during his life.

In ejectment brought to recover these lands on the death of *W. B. D.* by the heirs of the surviving trustees, after proof by them that *W. B. D.* was in receipt of the rents and profits:—

Held, that they might also give in evidence an annuity deed executed by *W. B. D.*, wherein was recited the will, and that the trustees had not sold the lands, and that *W. B. D.* was in receipt of the rents and profits by permission of the trustees, on the ground that it contained a declaration in derogation of his apparent right to the fee.

EJECTMENT for land and cottages at Clapton, tried before *Bolland*, B. at the Summer Assizes 1835, for Suffolk. The lessor of the plaintiff was the heir-at-law of the surviving trustee under the will of *William Daniel*. By that will the testator devised the lands in question to trustees to sell absolutely, and invest the proceeds in other lands to be held by them in trust to permit *William Barker Daniel* to receive the rents and profits during his life, remainder on his death without issue to *Thomas Daniel* in fee. The trustees did not sell, but permitted *W. B. Daniel* to deal with the lands as his own, and he was stated to have sold them as lands held by him in fee to the defendant *Coulthred*. *W. B. Daniel* died without issue previous to the action which was brought on behalf of the heir of *Thomas Daniel*. At the trial the will was admitted. The lessor for the plaintiff proved the receipt of rents &c. by *W. B. Daniel* from a tenant named *Baker*, who occupied during the lifetime of the testator, and up to the period of his own death, upon which his grandson, the defendant *Baldrey*, came in under a lease by *W. B. Daniel*, to whom he also paid rent. He then tendered in evidence an annuity deed from *W. B. Daniel* to one *Watier*, wherein *Daniel* recited his father's will, and described the property at Clapton as land directed to be sold, but stated that it was not sold, and that he received the rents and profits by permission of the trustees under the will. The evidence was objected to, but admitted by the learned judge, who reserved the point. Verdict for the plaintiff. A rule nisi was subsequently obtained to set aside the verdict for the plaintiff and enter it for the defendant, or to a enter a nonsuit.

Kelly now shewed cause.—The only question now to be considered is the *admissibility*, not the conclusiveness, of this evidence; and being a declaration of *W. B. Daniel*, it must be held to be admissible, whether the defendants claim under him or not. If they do, then it is an admission by the party interested at the time cutting down the extent of the title under which the defendants claim, and therefore is clearly admissible. It then stands upon precisely the same footing as a declaration by the defendants themselves. —[Lord *Denman*, C. J.—In the case of *Woolway* v. *Roe* (*a*), the declarations of a person who at the time of making them had the same interest as a party in the cause, were held admissible, though he was still alive, and might have been called.]—On the other hand, if the defendants do not claim under *W. B. Daniel*, the evidence is then admissible, as the declaration of a party being then and having long been in apparent possession of the estate, and himself in actual receipt of the rents and profits. It is admissible as being against his interest, for the effect is to cut down his interest from that of a tenancy in fee, which he otherwise would be presumed to have. This ground for the admission of evidence of such character has long been established; *Holloway* v. *Rakes* (*b*), *Peaceable* v. *Watson* (*c*), *Cordan* v. *Nicoll* (*d*), *Doe* v. *Pettett* (*e*); and it is not because some one else may since have got pos-

(*a*) 1 Ad. & El. 114.
(*b*) Cited by *Buller*, J. in *Davis* v. *Pierce*, 2 T. R. 53.
(*c*) 4 Taunt. 16.
(*d*) 1 Bing. N. C. 430.
(*e*) 5 B. & A. 223.

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DOE d. SHERIFF and others v. COULTHRED and another.

session of the property that such evidence is to be excluded. Were that so, any wrong-doer might by his own wrongful act shut out the only evidence of his want of title.

Storks, Serjt., and *Gunning*, contrà.—There was no proof at the trial that *Coulthred* did claim under *W. B. Daniel*, therefore the first ground of the argument is not applicable. In *Outram* v. *Morewood* (*a*), Lord *Kenyon* observes, what a man does in his closet ought not to affect the right of third parties. Here it is contended, that such an act is to affect the right of third parties, and that too when the act done is not against interest; because, secondly, the statement in the annuity-deed was certainly not a declaration against interest. On the contrary, it went to enlarge rather than cut down the interest of the party making it. By the will, *W. B. Daniel* had no title whatever to any lands at Clapton; they were vested in trustees to sell absolutely. The law would rather presume that the trustees had sold. *Doe* v. *Pettett* does not apply; there the declarations were unequivocally against interest.—[*Patteson*, J.—Taken as opposed to the receipt of rents and profits, the declaration must certainly be considered as against interest.]—It will rather be supposed here that the declaration applies to other lands in Clapton than those the subject of this action, especially as *W. B. Daniel* had never any legal title to those mentioned in the will. At all events, the identity of interest here was not clearly established, and it was on the ground of identity of interest only that *Woolway* v. *Roe* was decided.

Cur. adv. vult.

Lord DENMAN, C. J., on a subsequent day, after stating the facts of the case, delivered judgment.—A rule nisi for a new trial was granted on the question, whether certain evidence was admissible, namely, a deed executed by *W. B. Daniel*, for the purpose of raising a sum of money, to be secured by annuity on these premises, in which deed the will itself was recited: and it was also recited, that the trustees had not sold the property, and that *W. B. Daniel* was in receipt of the rents and profits by permission of the trustees. The learned judge admitted the evidence. We think he was right, on the principle that *W. B. Daniel* being once shewn to be in receipt of the rents and profits, this declaration in the deed, that he held under and by permission of the ancestor of the lessor of the plaintiffs, was in derogation of his own apparent right to be considered as the owner in fee. We cannot look at the equitable relation in which the parties stood to each other. The sole question is, in whom the legal estate resides. We think the admission of the person in receipt of the rent that he held under another, whether as tenant by sufferance, or as receiver of the rents, is undoubtedly evidence that he himself is not the owner of the legal estate. Then there is proof here *aliunde* that the lessor of the plaintiff had the legal estate under *W. B. Daniel's* will, and it is also proved that the grandfather of one of the defendants was in possession in the lifetime of the testator.

Rule discharged.

(*a*) 5 T. R. 121.

May 30th.

LANE, Gent. one &c., *v.* GLENNIE.

To an action for business done as an attorney, the defence that no bill duly signed has been delivered, must be specially pleaded.

Quære, whether it is necessary for such bill to specify the Court in which the business has been done.

ASSUMPSIT for business done as an attorney. Plea, non assumpsit. At the trial before Lord *Denman*, C. J. at the sittings after Michaelmas term, 1835, an objection was taken to the bill, which had been delivered a month before action brought, because it did not specify the name of the Court in which the business had been done. Verdict for the plaintiff, with leave to the defendant to move to enter a nonsuit.

Mansel, in the ensuing term, obtained a rule accordingly, and cited *Lester* v. *Lazarus* (*a*).

Crowder now shewed cause.—This objection, supposing it to be valid, is not open to the defendant under the plea of the general issue. This has been expressly decided by *Parke*, B. in *Moore* v. *Dent* (*b*), and in *Becke* v. *Mordaunt* (*c*) the Court appeared to be of the same opinion.—[*Patteson*, J. referred also to the case of *Holmes* v. *Grant* (*d*).]

Ball and *Mansel*, contrà.—The words in the statute (*e*) relative to attornies are analogous to those in the Apothecaries' Act, and the same effect must attend upon both. In *Morgan* v. *Ruddock* (*f*) it was held, that under the plea of non assumpsit it might be objected that the plaintiff was precluded under the statute 55 *Geo.* 3, c. 194, from recovering. It appears also from the report of *Becke* v. *Mordaunt*, in 4 *Dowling's* P. C. (*g*), that *Parke*, J. did not approve of the ruling by *Patteson*, J. in *Moore* v. *Dent*. No promise by the defendant can be inferred until after the delivery of a bill, pursuant to the statute. It is therefore open to him to urge the non-delivery as a defence under the plea of non assumpsit.

Lord DENMAN, C. J.—It seems to have been repeatedly decided that this defence must be specially pleaded. Those decisions have never been overruled, and we are not disposed to disturb them. Very great convenience results from requiring the grounds of the defence to be put upon the record.

LITTLEDALE, J.—The difference between the positions of attornies and apothecaries is this: as to attornies, they are competent to make a contract, but are disabled from recovering upon it if it appear that they have not complied with the provisions of the statute. But, as to apothecaries, the legislature deprives them of all capacity to make a contract unless duly qualified.

PATTESON, J.—The case of *Morgan* v. *Ruddock* was decided simply on the words of the statute, which provide that an attorney shall not recover unless he shall *prove on the trial* that he was duly qualified. It is impossible, therefore, without repealing the statute, to hold him entitled to recover unless he does give such proof.

Rule discharged.

(*a*) 2 C. M. & R. 665.
(*b*) 1 M. & R. 462.
(*c*) 2 Bing. N. C. 140; *S. C.* 1 Hodges, 196.
(*d*) 1 Gale, 69.
(*e*) 22 *G.* 3, c. 23.
(*f*) 4 Dowl. P. C. 311.
(*g*) 4 Dowl. P. C. 112, and see the note to *S. C.* in 1 Hodges, 196.

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May 30.

ECKSTEIN and another *v.* REYNOLDS.

1. Whether or not words which are ambiguous amount to a tender, is a question for the jury to determine.

2. "I tender you 8*l.* in settlement of *R.*'s bill," *R.*'s whole demand being for a greater amount. The Court held that these words were ambiguous, and refused to disturb a finding by the jury, that they amounted to an absolute tender.

DEBT for goods sold. Plea, nunquam indebitatus, except as to 8*l.*, as to which a tender. The cause was tried before Lord *Denman*, C. J. at the sittings after Michaelmas term, 1835. A witness who was called to prove the tender stated, that he went to one of the plaintiffs and said to him, "I call to tell you that I tender you 8*l.* in settlement of *Reynolds*'s bill." It was objected that this was only a conditional offer, and therefore did not amount to a legal tender. The learned judge left it to the jury to say whether it was conditional or not. Verdict for the defendant.

Thesiger having obtained a rule nisi for a new trial, on the ground that the question was not one for the jury to decide; that the offer was conditional, and that the learned judge ought therefore to have directed the jury to consider it as an invalid tender;

R. Alexander (with whom was *C. Jones*) now shewed cause. No doubt where an offer to pay money is clogged with a condition, it does not amount to a tender. The only question in this case is, whether the offer proved was conditional or not. Now the words used were ambiguous, and may have meant simply "I tender you 8*l.* on behalf of *Reynolds*." And where words used in mercantile transactions are susceptible of different meanings, it is for the jury exclusively to determine which meaning shall attach; *Clayton* v. *Gregson* (*a*), *Bold* v. *Rainer* (*b*). There are some cases which at first sight may appear unfavourable to the defendant; *Evans* v. *Judkins* (*c*), *Strong* v. *Harvey* (*d*), *Mitchell* v. *Ring* (*e*). But in all these the language used was unequivocal, and the plaintiff was required to accept the sum offered in discharge of the whole amount claimed. (He was then stopped by the Court.)

C. R. Turner, contrà. The rule of law with regard to tender is, that the offer must be unconditional, without *any terms;* the offer should be so made that if the plaintiff accepts, it is still open to him to say, that more is due; *Peacock* v. *Dickerson* (*f*), *Cheminant* v. *Thornton* (*g*). It cannot be contended that if the plaintiff had taken the 8*l.* "in settlement of *Reynolds*'s bill," it would still have been open to him to bring an action for the amount. The same phrase was used in *Mitchell* v. *Ring* "as a settlement," and the tender was held to be bad. Where the words are plain and clear, as they are here, there is no question for the jury; indeed it does not appear from any of the authorities that the words used have ever been referred to the jury to decide whether they amount to a valid tender or not. In *Finch* v. *Brook* (*h*) the jury found a special verdict, and the Court there decided that no tender had been made.

Lord DENMAN, C. J.—Suppose the order of the words used had been reversed, and the witness had said, "I call to settle *Reynolds*'s bill, and I tender

(*a*) 4 Nev. & Man. 602.
(*b*) 1 M. & W. 343.
(*c*) 4 Camp. 156.
(*d*) 3 Bing. 304.
(*e*) 6 C. & P. 237.
(*f*) 2 C. & P. 51 n.
(*g*) 2 C. & P. 50.
(*h*) 1 Bing. N.C. 253.

you 8*l.*" That certainly would have been a valid tender. The relative position of the words cannot alter the effect of them. In the cases cited for the plaintiff, the offer was only made on condition that the party would release the whole of his demand. The circumstances are very different here, and since the meaning of the words was certainly ambiguous, I think it was properly left to the jury to determine it.

LITTLEDALE, J.—I cannot bring myself to think that it is the province of the judge in all cases to decide whether words used are to be understood conditionally or not. In some they may be so clear that he may properly tell the jury no doubt exists about their meaning. But where they are ambiguous, as here, I think that the jury ought themselves to decide.

PATTESON, J., concurred.

Rule discharged.

BREARLEY, surviving Assignee of JAY *v.* ANDREW.

June 1.

Declaration on a promise by a bankrupt to pay a creditor in full, in consideration of his proving his debt under the commission, held bad on motion in arrest of judgment.

ASSUMPSIT. The first count of the declaration stated, that theretofore and before *Jay* became a bankrupt, to wit, on &c., defendant was indebted to *Jay* in 200*l.* for money had and received to the use of *Jay;* that before making the promise thereinafter next mentioned, to wit, on &c., a commission of bankruptcy was issued against defendant, and thereupon defendant, to wit, on &c., in consideration of the premises, and that *Jay* would prove said debt of 200*l.* against defendant's estate under his bankruptcy, defendant promised *Jay* to pay him the said sum of 200*l.* after the delay of a few months. Averment, that although five years had elapsed since the promise, and although *Jay* did afterwards prove said debt of 200*l.* under defendant's commission, defendant had not paid the 200*l.*

Plea. Non assumpsit.

At the trial before *Patteson*, J. at the London sittings after Michaelmas term, 1835, the plaintiff having obtained a verdict, *W. H. Watson*, in the following term, obtained a rule nisi for arresting the judgment.

Sir *F. Pollock* (with whom was *Hoggins*) now shewed cause. The objection to the declaration is, that it does not state any consideration for the defendant's promise; but, after verdict, many circumstances may be suggested, under which the promise would be supported by a good consideration. Suppose the defendant had fraudulently obtained money from the plaintiff, the plaintiff might recover it back either in trover or assumpsit; *Abbots* v. *Barry* (*a*); and if, on the application of the defendant, he waived tort, and consented to prove, as a debt under the commission, the amount so obtained from him, that would be a good consideration for defendant's promise. The circumstances under which defendant obtained the money may amount even to misdemeanor; still his promise, in consideration of the plaintiff not prosecuting him, might be sustained. Such a promise would not be void on the

(*a*) 5 Moore, 98.

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score of public policy, for all misdemeanors, whether they consist in not serving an office, in not repairing a road, or in any graver matter, may alike be compounded. In *Gilmour* v. *King*(*a*), where a stranger agreed to become assignee of a bankrupt's estate, on receiving an indemnity against costs, an agreement by the petitioning creditor, who was also solicitor to the commission, to give such an indemnity, was held good. Many other cases may be supposed in order to uphold the declaration after verdict.

W. H. Watson, contrà, was not heard.

Lord DENMAN, C. J. (after stating the agreement.)—The mere statement of the defendant's promise shews it to be invalid. The declaration cannot be supported except by the supposition of a number of facts, of which there is no trace in the record.

LITTLEDALE, J.—I am of the same opinion. This is an unqualified promise by a bankrupt to pay one of his creditors in full.

PATTESON, J.—It is not necessary to say whether the declaration would be good, if it stated the facts which have been suggested at the bar; it is enough to say, that they are not stated, nor any other facts constituting a legal agreement.

Rule absolute to arrest the judgment (*b*).

(*a*) 1 C. & M. 612.

(*b*) *Williams*, J. sat in the Bail Court for *Coleridge*, J., who was absent from illness.

FIELD *v.* WOODS.

June 1.

In an action on a banker's cheque, to which the defendant pleaded that he did not make the cheque modo et forma, the instrument, which was unstamped, was proved by the plaintiff and read without objection. The defendant then tendered evidence that the cheque was post dated, and therefore inadmissible in evidence for want of a stamp:—*Held*, 1. As the cheque was unobjectionable on the face of it, that the defendant was not precluded, after it had been read, from objecting to it as inadmissible in evidence.

2. That the want of stamp need not be specially pleaded.

ASSUMPSIT on a banker's cheque drawn by defendant on the 12th June, 1835.

Plea, that the defendant did not draw the said cheque modo et formâ.

At the trial before *Williams*, J. at the London sittings after Hilary term, 1836, the defendant's counsel, after the cheque had been put in and read, stated that he was prepared to prove that the cheque was post-dated, and contended that it was therefore inadmissible in evidence, for want of a stamp. The learned judge, conceiving that such a defence ought to have been raised by the pleadings, directed a verdict for the plaintiff. *Payne*, the following term, having obtained a rule nisi for a new trial on the ground of misdirection,

Channell now shewed cause. The want of a proper stamp has not the same effect upon all instruments. Some of them it makes void, as indentures of apprenticeship, in which the consideration is not truly set forth; others it merely makes inadmissible in evidence. The cheque in question was certainly not void for want of stamp, and was properly allowed to be read in evidence. The 55 *Geo.* 3, c. 184, does not incorporate the provisions of 31 *Geo.* 3, c. 25, s. 19, rendering bills or drafts, which are not duly stamped, inadmissible in evidence; but simply imposes in ss. 11, 12 & 13, penalties upon the issuing such instruments either not duly stamped or post dated,

without either avoiding them or affecting them as instruments of evidence; *Allen* v. *Keeves* (*a*) and *Whitwell* v. *Bennett* (*b*) may be cited to shew this cheque was void; but *Upstone* v. *Marchant* (*c*) and *Williams* v. *Jarrett* (*d*) decide that the date given on the face of bills is to be taken as their real date. The cheque was to be taken on the same principle to be dated truly, and consequently was properly received at the trial.

But the objection, even if tenable, was not made until after the instrument had actually been read, and was therefore too late. The evidence had been received without objection and could not be expunged.

Lastly. The defence should have been specially pleaded: it has the effect, not of denying the contract declared upon, but of avoiding it by extrinsic matter. A new and independent fact was sought to be introduced at the trial, a fact not, like the insufficiency of a stamp to a bill, apparent upon the instrument when produced, but a fact requiring evidence, unconnected with the issue, to establish it.—[*Patteson*, J.—If the objection might be taken to a bill of exchange, it might equally be taken to a post dated cheque, for if post dated, it is no cheque at all, but a bill of exchange, and should have been declared upon accordingly.]—The defence, if good, was to shew the instrument was tainted with illegality, and is instanced in the new rules as one of the defences which must be specially pleaded.

Payne, contrà. The want of stamp was not any defence at all, but an infirmity in the title of the plaintiff himself; it could not therefore have been pleaded, and *M'Dowall* v. *Lyster* (*e*) and *Dawson* v. *M'Donald* (*f*), are express decisions on this point. The 31 *Geo.* 3, c. 25, s. 19, does not make void such a cheque, it merely says that it shall not be received in evidence. How could this be pleaded?

With respect to the time of taking the objection, *Jones* v. *Fort* (*g*) is an authority that evidence improperly received may be struck out at any time, and that the party objecting to it will not even be allowed to interpose in the first instance.

In *Williams* v. *Jarrett* there was a stamp upon the instrument, although it was insufficient. This case is the same in principle with *Allen* v. *Keeves* and *Whitwell* v. *Bennett*, where the instruments had no stamp at all.

Lord DENMAN, C. J.—The case of *Dawson* v. *M'Donald* was not decided when this case was tried, or my brother *Williams* would have received the evidence offered by the defendant. That case is not distinguishable from the present. Here is a contract good on the face of it, but shewn by extrinsic evidence to require a stamp. The only effect of that is, as observed by *Parke*, B. in *Dawson* v. *M'Donald*, "That the instrument cannot be given in evidence. Allowing such pleas as this," he adds, "only raises doubts at the bar where none really exist." In that case the Court refused to allow defendant to plead that the instrument was not properly stamped.

LITTLEDALE, J.—I am of the same opinion. The language of 55 *Geo.* 3, c. 184, is quite comprehensive enough to embody the provisions of 31 *Geo.* 3, c. 25, s. 19, as to the inadmissibility of bills of exchange in evidence, unless

(*a*) 1 East, 435.
(*b*) 3 Bos. & Pul. 559.
(*c*) 2 B. & C. 11.
(*d*) 5 B. & Ad. 32.
(*e*) 2 M. & W. 52.
(*f*) 2 M. & W. 26.
(*g*) Moo. & Mal. 196.

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they are properly stamped. This instrument did not come within the exemption from the stamp duties upon bills of exchange enumerated in the schedule of the latter act, because although a "draft or order" in form, it did not "bear date on or before the day," on which it was issued. Not being then within the exemptions, it was within the enacting part of the schedule, relative to bills of exchange, and so, according to section 19 of the former act, was inadmissible in evidence for want of a stamp. But it is said, that as the instrument had in point of fact been read in evidence, without objection, that the evidence could not afterwards be expunged. That is the rule with respect to instruments on the face of which the objection is apparent, but it is otherwise where the objection can only be raised by extrinsic evidence, as was the case with the cheque in question. It appeared to be receivable until the defence was entered upon and disclosed new facts, which shewed that it was not receivable. As to the necessity of pleading specially the want of stamp, the recent decision in the Court of Exchequer is in point and quite conclusive.

PATTESON, J.—The *55 Geo. 3, c.* 184, appears to me to incorporate 31 *Geo. 3*, c. 25, s. 19, which says, that instruments not duly stamped shall not be "admitted" to be "available in law or equity." Now although the instrument in question had been read, it was merely primâ facie in evidence, not actually so; and the extrinsic proof of its having been issued before the time of its date rendered it inadmissible. The enacting part of the schedule to *55 Geo. 3*, comprises all bills of exchange; but drafts or orders dated on or before the time of their issuing fall within the exemption afterwards given. Now the circumstance that this cheque was issued before the time of its date, and that consequently it did not come within the exemption of the schedule, could not appear on the face of the instrument so as to exclude it from being read in the first instance. But that circumstance was made to appear by extrinsic evidence, and the ordinary presumption was thereby rebutted, that the date, which an instrument purports to bear, is the real date. Was it then required by the new rules of pleading that the want of stamp should be specially pleaded? Clearly not. The objection did not in any way avoid the effect of the instrument by way of defence, but merely excluded it as a means of proof. The case in the Exchequer is a direct authority.

WILLIAMS, J., concurred. Rule absolute.

DOE *d.* WINDER and MARY his Wife *v.* LAWES.

EJECTMENT for the undivided third part of certain copyhold lands within the manor of Ham, in the county of Surrey, tried before Lord

The following words in a will, "I give, devise and I bequeath all my copyhold in H."—*Held*, in their ordinary meaning to be descriptive only, and that as the whole will did not raise a *necessary* inference that they were used in another meaning, they passed an estate for life only.

2. His want of admittance does not prevent the heir at law from devising his reversion expectant on a life estate, whether the tenant for life has been admitted or has not.

3. The admittance of devisee for life is the admittance of the reversioner also, and has relation back to the period when the devise came into operation, i. e. the death of the surrenderor.

4. A devise of the reversion to a tenant for life merges the life estate, and upon the vesting of the reversion the admittance of the tenant for life is therefore spent, and a new admittance is necessary.

5. Admittance enures according to the title, whatever the form of admittance may be, therefore admittance of customary coheirs enures according to their title as coheirs, even although they professed to be admitted as devisees.

Denman, C. J., at the Spring assizes for that county in 1835. Verdict for the plaintiff, subject to the opinion of the Court upon a case, from which it appeared,

That in 1804, *Philip Cawston* the elder, having been admitted to the lands in question, surrendered them to the use of his will, and in 1811 died, leaving his widow and his son, *Philip Cawston*, the younger, surviving.

The material part of his will was as follows. The will and both the codicils were in the testator's own handwriting:—"I give and bequeath to *Sarah*, my dearly beloved wife, my freehold in Hertfordshire, and estate in Petty France, Westminster; all my right and title to the Robin Hood premises in Kingston Bottom, in the parish of Ham, in the county of Surrey; and all my household furniture, together with my clothes and debts, and my plate and stock in trade, whom I likewise constitute, make and ordain the sole executrix of this my last will and testament, by her freely to be possessed and enjoyed during her life, and at her demise my children to have equal share. If my loving children die before their mother, *Sarah Cawston*, she is at her free will to give and bequeath the aforesaid property to home (*a*) she please (*a*). And I do hereby utterly disallow, revoke and disannul all and every other former testament, will, &c., and no other to be my last will and testament. Dated 29 September, 1791. *P. Cawston.*" (L. S.)

"N.B. I likewise give, demise and bequeath to *Sarah*, my dearly beloved wife, all monies in the hands of *Biddulph, Cox & Ridge*, bankers, Charing-Cross, and money that may at any time be put into the Bank of England, or lodged elsewhere. October 28, 1799. *P. Cawston.*"

"I likewise give, demise and bequeath to *Sarah Cawston*, my dearly beloved wife, all my copyhold in the hamlet of Ham, in the parish of Kingston, in the county of Surrey; and likewise all monies lent out upon mortgage, bonds, or notes of hand. *P. Cawston.* Dated this 20th day of September, 1805."

14 June, 1811. The will and codicils were proved by the widow, and in 1812, at a manor court, the homage presented the death of *Philip Cawston* the elder, and at the same court his widow was admitted to hold the lands &c. according to the will of her late husband, at the will of the lord &c.

Philip Cawston the younger was never admitted as tenant in reversion or otherwise to the lands in question, nor were they surrendered to the use of his will, which was dated 18th March, 1811, and was as follows:—

"I do constitute and appoint my beloved mother, *Sarah Cawston*, whole and sole executrix to this my will, and further I do hereby bequeath and give unto my said mother and executrix all and singular my whole and sole property I may die possessed of, or having right or title to in money, goods, clothes, leasehold, copyhold or freehold, bank stock, annuities, mortgages, bonds, notes, or any hereditary property I may either die possessed of, or have any legal claim or expectation to the same. As witness my hand and seal this 18th day of March, in the year of our Lord 1811. *Philip Cawston.*" (L. S.)

Sarah Cawston was not admitted under this will, nor did she prove it.

In 1824 she made her will, whereof *Samuel Baxter* and *George Smallbones*

(*a*) Sic.

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were executors, and devised all her estates, freehold and copyhold, to *Samuel Holden*, *Daniel Cork* and *Samuel Baxter*.

In 1825 she died, and at a manor court held in 1826 her three devisees produced the letters of administration with the will annexed of *Philip Cawston* the younger, paid the fine upon his neglected admission, and were severally admitted to an undivided third of the copyholds in question.

The 7th rule of customs of the manor, which alone applies to the present case, is as follows:—

VII. "The seventh part of our customs is, that if any tenant which holdeth land of our sovereign lord the king, do sue it out of the said court without license of the lord of the soil, he is to forfeit all his copyhold which he hath lying within the lordship, except it be brought out by the commandment of the king or his most honorable counsel; and furthermore, whether he came to it by inheritance or by purchase, and so holding it to him, his heirs or assigns, and so at the hour of his death deliver and surrender to his next heir; and if so be that after the death of any such tenant the heir doth give, set or lay to mortgage any copyhold land lying within any of the said lordships before the said heir be admitted and hath paid his fine according to the custom and manor of the said lordships, that their sale, grant, surrender or mortgage made by the same heir shall stand clearly void and of none effect by our customs."

Mary Winder, the lessor of the plaintiff, is one of three sisters of *Philip Cawston* the elder, and claims an undivided third part of the lands in question as coheiress of *Philip Cawston* the younger, by descent.

Daniel Cork and *Samuel Butler*, two of the devisees under whom the defendant claims, are the nephews and customary coheirs of *Sarah Cawston*.

The question for the opinion of the Court is, whether the plaintiff be entitled to recover. If the Court be of that opinion, the verdict is to stand, if not a nonsuit is to be entered.

Mansel, in Michaelmas term, argued the case on behalf of the lessors of the plaintiff.

J. Hodgson contrà.

Mansel in reply (*a*). *Cur. adv. vult.*

Lord DENMAN, C. J., in this term delivered the judgment of the Court. It is admitted in this case that the lessor of the plaintiff, *Mary Winder*, as one of the customary coheiresses both of *Philip Cawston* the father, and *Philip Cawston* the son, has a good title to the copyhold in dispute; unless the inheritance of it has been effectively disposed of either by the last codicil to the will of the former, or by the will of the latter. Two points have accordingly been made in the argument for the defendant; the first, that an estate in fee passed by the codicil to the will of *Philip Cawston*, senior, to *Sarah Cawston*, under whom the defendants claim; the second, which arises only if the first is not sustainable, that she took the same estate under the will of her son, and that it has passed to the defendants, or some of them.

(*a*) The arguments and authorities are fully discussed in the judgment of the Court, the arguments of counsel are therefore omitted.

The codicil is as follows:—"I likewise give &c. to *Sarah*, my dearly beloved wife, all my copyhold in the hamlet of Ham, in the parish of Kingston, and in the county of Surrey, and likewise all monies lent out upon mortgage, bonds or notes of hand." It was contended, that the words "all my copyhold" were equivalent to "to all that I hold by copy;" and if so read, even by themselves must be taken to import, not merely the land so held, but the interest in the land, i. e. the estate: that this meaning, if doubtful in itself, was rendered clear by the juxta-position in the same sentence of the words "all monies lent out upon mortgage, &c.," as to which it was clear that the testator's whole interest would pass absolutely to *Sarah Cawston*. Moreover, reading the codicil in question with the will itself and the prior codicil, it is said that a clear intention on the part of the testator may be collected to die intestate as to no part of his property; and further, that in the will itself, where there was an intention, both as to realty and personalty, to limit the interest of the wife, first given her, to a life estate, the testator, an illiterate person, making his own will, has evinced his own understanding of the manner in which such an intention might properly be carried into effect by adding express words of restraint; and that a contrary intention to give the whole interest must be inferred from the absence of any such words in the codicil in question.

The argument therefore for the defendant rests upon the import of the express words, and upon the evidence of intention to be collected from the face of the will. We are of opinion, that the words themselves, even read as we are desired to read them, and conjoined with the other bequest in the same instance, are not sufficient to carry the fee; the property appears to us to be described only by its tenure and local situation, and that these words of description do not include the quantity of interest in the testator; see *Right* v. *Sidebotham* (*a*). In *Doe* v. *Child* (*b*) and *Doe* v. *Wright* (*c*) where the same devise received a construction by the Courts of Common Pleas and King's Bench, the words "all my lands, freehold, copyhold, and leasehold, in the county of Essex," were held to pass only an estate for life in the freehold and copyhold; and in *Doe* d. *Norris* v. *Lucker* (*d*) a case very much resembling, but somewhat stronger than the present, a devise to sons "share and share alike, equally to be parted between them," (after the death of the testator's wife) of the "above bequeathed lands, goods, chattels," was held to give them only an estate for life, though the "above bequeathed lands" were first specifically bequeathed for life as "my freehold *estate* called Pouncotts." The argument therefore is reduced to the evidence of intention, and certainly no one can read the will and codicils attentively, without forming at least a strong opinion that the testator intended to give to his wife the whole and absolute interest in the copyhold in question; but cases so clear and numerous, and standing on too strong a principle to be overruled by us, have decided, that where the words used by a testator in any devise can be satisfied by understanding them in their ordinary meaning (and if the words be technical, the technical is their ordinary meaning,) and where the whole of the will does not make it a *necessary* inference that they were used in any other, the Court cannot give them any other. Our duty is to ascertain the intention of the testator by what he has written; and in so doing, for the sake of

(*a*) 1 Doug. 759.
(*b*) 1 N. R. 335.
(*c*) 7 T. R. 64.
(*d*) 3 B. & Ad. 473.

uniformity of decision, we must take him to have used his language in its ordinary meaning, if it bears any, and unless by so doing we necessarily contradict an overruling intention unequivocally expressed in the context. Tried by this rule, we think it clear, that a life estate only in the copyhold in question passed by the codicil, and we therefore proceed to the second and more important point in the argument for the defendant.

The second point is, that *Sarah Cawston* took an estate in fee in the copyhold, under the will of *Philip Cawston*, her son, which it was not disputed contained words sufficiently large for the purpose. This assumes that the reversion descended on him, and the facts stand thus:—*Sarah* was admitted "to hold according to the will of her husband;" the heir at law was never separately admitted, nor did he ever surrender to the use of his will. In 1811, and before the admission of *Sarah*, he made his will, and devised the reversion to her in fee, and died in 1819. She was not admitted under that will nor did she administer to it, but she devised over to the defendants (*a*) by a will made in 1824, and died in 1825. Two of the defendants (*a*) are her customary coheirs, and all have been admitted. As the will of *Philip Cawston*, junior, contains an express devise of copyholds, and he died after the passing of the 55 *Geo.* 3, c. 192, it seems clear, upon the words of that statute and the authority of *Doe* v. *Bird* (*b*), that the mere want of a surrender by him would be cured; but it was contended in the first place, that his devise without surrender was inoperative for want of his previous admission. Now unless there be a distinction in principle as to this point between the devise of an estate which has descended in possession on the heir at law, and that of a reversion so descending, the case of *Right* v. *Banks* (*c*) is a direct and considered authority that admittance is not necessary. It is difficult to see how there can be any distinction between the two supposed cases. Upon the death of the father, in the present case, and before the admittance of the widow, the whole legal estate descended in possession on *Philip*, the heir at law; *Roe* v. *Hicks* (*d*). At that time he might have made a valid surrender before admittance, and his will after such surrender, and without any admittance, would have passed the estate. The *extent* to which the will would have operated *beneficially* might have been subject in equity to the equitable rights of the devisee for life under the prior will; but at law the legal estate must have prevailed.

Thus it would have stood if the devisee for life never had been admitted; and this case would then have been precisely the same as that of *Right* v. *Banks*. But how can her admittance, her interest being only a tenant for life, prejudice the heir's legal estate, or the operation of his will beyond the extent of her interest? Her admittance would indeed turn his estate into a reversion; but as reversioner he would have been equally in the seisin as before,—he might equally surrender that interest; *Colchin* v. *Colchin* (*e*). Indeed, before the passing of the statute he *must* equally have surrendered it in order to make an effectual devise; after a surrender, the interest would have been equally devisable, and if so, the statute operates and makes it devisable without such surrender. Accordingly in the *King* v. *Turner* (*f*) it will be seen

(*a*) i. e. the devisees, under whom the defendants claim.
(*b*) 2 N. & M. 679; 5 B. & Ad. 695.
(*c*) 3 B. & Ad. 664.
(*d*) 2 Wils. 13, 16.
(*e*) Cro. Eliz. 662.
(*f*) 2 Sim. 545; 1 Mylne & Keen, 456.

that the testator, whose devise without admittance was held to be inoperative, was an heir-at-law on whom a copyhold had descended in reversion, subject to the free bench of the widow, *durante* viduitate.

Thus we come to a conclusion, that the want of an admittance by the heir-at-law will not prevent the operation of his will, on the ground, 1st, That it could not have that effect if the devisee for life never had been admitted: and 2dly, That her admission subsequently to the devise cannot prejudice its operation upon the reversion. It is perhaps therefore unnecessary to consider a further answer which was given at the bar to this objection, that *Philip*, the son, was in fact admitted by virtue of the admission of *Sarah*, but it may be as well to dispose of that point also. The authorities are numerous and clear to shew that the admission of the particular tenant, is the admission of the remainder-man also; and the principle on which that has been laid down applies equally to the reversioner; namely, that the particular estate and the remainder make but one estate. And as to a distinction which may exist in respect to the lord's fine between the two cases, that will not be material upon the present point, which regards only the vesting of the estate for the purpose of transmission. Nothing is found in the present case as to any special custom with regard to the lord's fine, which affects the question now before us: in the absence of any such custom, the payment of the fine is collateral to the vesting of the estate, and our decision of this case, as between these parties, will not in any way prejudice the lord's right. Some observations were made upon the form of *Mary Cawston*'s admission; but we think that immaterial: the form of the admission, whatever it may be, enures according to the title. And we accede to the argument, that the admittance, when once made, had relation back to the period when the will came into operation, i. e. the death of the surrenderor. *Sarah Cawston* became full tenant by her admission from that moment; and whatever effect her admittance had on the reversion in her son, it equally had from the same point of time. The general doctrine of relation in the case of admittance is familiar and clear, and we see no ground for any distinction. Assuming therefore that admittance was necessary to give effect to the will of *Philip Cawston*, the son, we are of opinion that he was *de facto* admitted.

Third point.

There remains however one difficulty to be considered in the title of the defendant; *Sarah Cawston* was never admitted under the will of her son, and as a general rule nothing is clearer than that the *devisees* of an unadmitted devisee have no legal title, without a surrender from the heir-at-law of the testator; *Smith* v. *Triggs* (*a*), *Wainwright* v. *Elwell* (*b*). Two modes are suggested at the bar by which this difficulty may be met; the first, that a tenant for life, once admitted as such, to whom the reversion comes by devise, needs no second admission in respect of such reversion: the second, that her heirs having been admitted, that admittance will relate back to the surrender, or that statutable equivalent to a surrender made to the use of the will, under which their ancestor would have taken. The statement in the case must be taken to import, and from a transcript of the admissions which has been sent us it appears, that the devisees have each been admitted to an undivided third of the copyholds in question; if so, there is a third of the land now in dispute, to which the two, who are also customary heirs, have not been admitted in any capacity; and therefore this second answer, if satisfac-

(*a*) 1 Strange, 487. (*b*) 1 Madd. 627.

tory in itself, will still leave the defendants undefended as to that one-third. It is proper therefore first to consider the answer which applies to the whole.

Upon this point it was argued, that the devise of the reversion to the tenant for life operated by way of enlargement of her estate; that the life estate was not merged, although it was admitted that it did not remain distinct from it; that the life estate therefore still remaining *in esse* in a certain sense, though united with the fee, no new admittance in respect of the fee was even possible, and that the former admittance enured not merely according to the estate which the tenant for life at that time had, but also according to her estate in its altered condition. No authorities were cited in this part of the argument, and, after some search, our decision must rest on analogy and principle, rather than any decision in point.

It seems to us difficult to say, that the life estate in this instance did not merge. A devisee takes by purchase; and although it be true that without any act done by him, such as entry or express declaration, to show his assent, the estate by presumption of law vests in him immediately on the death of the devisor; *Co. Litt.* 111 a.; yet that this is founded on a presumption of fact, that he assents to what is for his benefit, is clear from this, that he may, by certain express acts of dissent, waive the devise before entry; *Townson* v. *Tickell* (*a*), *Doe* v. *Smith* (*b*).

If then the devisee tenant for life has taken the reversion by purchase, is this any thing more than an ordinary case of merger? The two estates have come together in the same person, but they cannot co-exist in the same person without involving many legal inconsistencies; the lesser therefore, by the rule of law, is drowned or annihilated in the greater.

Mr. *Hodgson*, who argued this case most ingeniously for the defendants, seemed to be aware of the consequences of our holding the life estate to be merged; they are indeed obvious. By the admission *de facto* of *Sarah Cawston* under her husband's will, we have held that she was admitted to her life estate and her son inclusively, if necessary to the reversion. This latter effect was of course spent upon the death of the son, and if the reversion cannot vest in her without immediately annihilating her life estate, the first effect of the admission will upon that event be equally spent, and a new admission will consequently be necessary. This case therefore falls within the general rule and the title of *Sarah Cawston*'s devisees as such cannot prevail; *Vernon* v. *Vernon* (*c*).

It is therefore necessary to consider the second answer, which rests the defendant's case upon the title of the admitted heirs; and we are of opinion, that to the extent of the two-thirds, to which they have been respectively admitted, that ought to prevail.

The devisee under a will of copyhold before the statute, was in truth no other than a surrenderee under the surrender to the uses of the will; in this respect the statute, dispensing with the necessity for an actual surrender, has made no difference; as such surrenderee, he is entitled to admittance, and if he dies before admittance, his customary heir is entitled in the same manner; and when admitted, the legal estate is in him by relation from the surrender; 4 *Co. Litt.* 29 b; *Bac. Abr.* Copyhold (G 8); and *Vaughan* v. *Atkins* (*d*). In

(*a*) 3 B. & Ald. 31.
(*b*) 9 D. & R. 136; *S. C.* 6 B. & C. 112.
(*c*) 7 East, 8.
(*d*) 5 Burr. 2764.

this respect the case of the heirs of such devisee or surrenderee differs from that of the devisee of either; the latter claiming only under the will of the unadmitted devisee or surrenderee, does not by admittance connect himself with the first devisor or surrenderor, in whose heir the legal estate remains; there would appear, as observed by *Lawrence*, J., in the case of *Doe* v. *Vernon* (*a*), a chasm in the court rolls between the surrender to the use of one person's will and an admittance under that of another. But the heir of the unadmitted surrenderee is in by descent and represents his ancestor.

If this reasoning be correct, we think it clear, further, that the effect of this admission of the customary coheirs of *Sarah Cawston*, is not altered by the circumstance that they professed to be admitted as devisees. We have already had occasion to state, that the admittance, where the act of the lord is ministerial only, always enures according to the title; this is very clearly laid down in *Westwick* v. *Wyer* (*b*), and several cases are there stated fully establishing the position. We are therefore of opinion that the coheirs of *Sarah Cawston* having been admitted to two undivided thirds of the tenement, the heirs of *Philip Cawston*, the son, are now entitled only to the remaining third, and they being three in number, the lessors of the plaintiff are entitled to recover one-third only of the land which has been the subject-matter in dispute in this action.

Verdict for the plaintiff.

(*a*) 7 East, 24. (*b*) 4 Co. 28 b.

HITCHCOCK *v.* WAY.

ASSUMPSIT by indorsee against the acceptor of a bill of exchange, drawn on the 25th of September for 250*l.*, payable to the drawer's order three months after date. The declaration was dated of Michaelmas term, 1831.

Plea: non assumpsit.

At the trial before *Coleridge*, J. in Hilary term 1836, it appeared that the bill had been accepted for money lost at play, but that the plaintiff was a bonâ fide holder for value. It was contended on behalf of the defendant, that the bill was altogether void by the 9 *Ann.* c. 14; on behalf of the plaintiff, that the bill was set up in the hands of the plaintiff as being a bonâ fide holder, by the 5 & 6 *Will.* 4, c. 41, s. 1, which enacts, that securities given for considerations arising out of illegal transactions shall not be void, but merely be deemed to have been given for an illegal consideration. The learned judge directed a verdict for the plaintiff, reserving leave to the defendant to move to enter a nonsuit.

The 5 & 6 *W.* 4, c. 41, repealing so much of 9 *Anne*, c. 14, and other statutes, as made securities given for illegal consideration altogether void, is prospective. Where therefore an action brought by a bona fide holder of a bill of exchange, accepted for a gambling debt, was at issue before the passing of the former act, but was tried afterwards, it was held that the plaintiff could not recover.

Andrews, Serjt., having obtained a rule accordingly,

Maule and *Humfrey* shewed cause (*c*).—The first section of the 5 & 6 *Will.* 4, applies to all securities unsatisfied at the time of the passing of the act. The language of it is unqualified with respect to former acts upon the same subject-matter, "that they shall have the same force and effect which

(*c*) In Easter Term, April 24, before Lord *Denman*, C. J., *Littledale*, *Patteson*, and *Coleridge*, Js.

they would respectively have had, if, instead of enacting that any such note, bill, or mortgage, should be absolutely void, such acts had respectively provided that every such note, bill, or mortgage, should be deemed and taken to have been made, drawn, accepted, given, or executed, for an illegal consideration." The second section expressly applies to securities given after the passing of the act, so that the attention of the legislature had clearly been directed to the position of securities given before the passing of the act, and the general words, therefore, applicable to them in the first section were introduced advisedly. If this section had simply repealed prior acts, so far as they make void a bill like the present, the effect would be simply to make it a good bill. In *Surtees* v. *Ellison* (*a*), Lord *Tenterden* observes, "It has been long established, that when an act of parliament is repealed, it must be considered (except as to transactions passed and closed) as if it had never existed." As, however, the first section, instead of simply repealing prior acts, says they are to have the same force which they would have had, if instead of enacting that every such bill should be absolutely void, such acts had provided that they should be deemed to have been given for an illegal consideration, the result is the same as if "illegal consideration" were substituted for "void" in the act of *Ann.* itself.

But there are many cases in which statutes have been held retrospective, although they were not expressly so designated by the legislature. In *Towler* v. *Chatterton* (*b*), and *Hilliard* v. *Lennard* (*c*), Lord *Tenterden's* Act, (9 *Geo.* 4, c. 14,) requiring all promises to be evidenced by writing, in order to save the Statute of Limitations, was held to apply to promises made before the act. In those cases the parties were actually at issue when the act passed, and the retrospective force given to it deprived innocent persons of their right of action. Here the defendant, who seeks to evade the retrospective force of the 5 & 6 *Will.* 4, is by no means innocent. In *Grant* v. *Kemp* (*d*), and *Freeman* v. *Moyes* (*e*), the 3 & 4 *Will.* 4, c. 42, s. 31, imposing for the first time upon executors, suing in right of their testator, the liability to costs, was held to relate to actions commenced by them before the passing of the act. In *Charrington* v. *Meatheringham* (*f*), the defendant was by the passing of the recent Highway Act, (5 & 6 *Will.* 4, c. 50,) after the time of trial, but before judgment, deprived of his right to treble costs on nonsuiting the plaintiff, under 13 *Geo.* 3, c. 78.—[*Coleridge*, J.—In *Jaques* v. *Withey* (*f*), it was held that a contract, declared by statute to be illegal, is not made good by a subsequent repeal of the statute.]—The plaintiff does not stand merely on the repeal of prior statutes, but prays in aid the positive enactments of the recent statute in affirmance of his claim.

Sir *J. Campbell*, A. G., Sir *W. W. Follett*, and *Martin*, contrà.—Nothing remained to be done to complete this transaction. It was in its commencement illegal, and from then, and up to the time of plea pleaded, it remained perfectly void. Suppose the plea had been, instead of the general issue, that the bill was given for money lost at cards, and the plaintiff had replied that he was a bonâ fide holder, that would have afforded no answer at that

(*a*) 9 B. & C. 750.
(*b*) 6 Bing. 258.
(*c*) Moo. & Mal. 297.
(*d*) 2 C. & M. 636.
(*e*) 1 Ad. & El. 338.
(*f*) 2 M. & W. 228.
(*g*) 1 H. Bl. 65.

time, and nothing occurring afterwards can alter the situation of the parties. Pleas must apply to the time when they are pleaded.

1. No statute is to be presumed to be retrospective. 2. The object of this act is attained by construing the first section prospectively. 3. By construing it retrospectively it is not attained, and involves an absurdity.

There is nothing to shew this act was meant to be retrospective; a new law neither avoids existing contracts nor sets up those which are void at the time of its passing. *Gillmore* v. *Shuter* (*a*), and *Bacon's Abr.* Stat. (C). In *Paddon* v. *Bartlett* (*b*), Lord *Abinger*, C. B. says, "Courts in general will not construe acts as retrospective unless the meaning is very plain." *Surtees* v. *Ellison* (*c*) is not applicable; all that Lord *Tenterden* says is, that for a certain period there actually was no Bankrupt Act in existence. The cases under Lord *Tenterden's* Act are not at all to the purpose. The legislature had determined by Lord *Tenterden's* Act, that after a certain period, parol evidence in certain cases should not be receivable. That act is not applicable to contracts, but only to evidence of them; *Ansell* v. *Ansell* (*d*), where the distinction is taken. Besides, by that act a period was assigned during which actions might be supported by the same evidence as before.

By the second section, money paid to the innocent holder of any illegal security given after the passing of the act, may be recovered back from the person to whom such security was originally given, so that in the end the result is as if no money had been lost at play at all. This section is admitted to be prospective. What then will be the consequence of holding the former section to be retrospective? The defendant will be obliged to pay the plaintiff, as the innocent holder of the bill; but as the second section is *not* retrospective, he will not be able to recover the amount paid from the winner, to whom he gave the bill. If the first section be held retrospective, the result will be to set up all unpaid gambling securities that have been given within the last six years. This case is quite within the distinction taken by Serjt. *Adair*, in *Jaques* v. *Withey* (*e*). He says, that where a contract is originally good, and a statute passes to make it void, and then that statute is repealed, the contract is set up again. But where the contract is originally void by statute, it cannot be made valid by repeal of the statute.

Cur. adv. vult.

Lord DENMAN, C. J., on this day, after stating the facts of the case, gave judgment as follows:—After issue joined, the act was passed repealing that part of the former statute which makes the bill void, and enacting, that any bill "which, if that act had not passed, would have been absolutely void, shall be deemed and taken to have been made and drawn for an illegal consideration," and that the same consequences shall ensue.

The plaintiff argued that this enactment could only receive effect at the time of trial, and the Court was bound to act upon it at that period; and many cases were cited in which acts of parliament repealing and altering the law had been so construed. But they all turned on the peculiar wording of those acts, which appeared to the Court to compel them to give the law an ex post facto operation. It is enough to say that we find no such words in the 5 & 6 *Will.* 4, c. 41, and are of opinion, in general, that the law, as it

(*a*) 2 Show. 17.
(*b*) 2 Ad. & El. 9.
(*c*) 9 B. & C. 750.
(*d*) Moo. & Mal. 299.
(*e*) 1 H. Bl. 65.

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existed when the action was commenced, must decide the rights of the parties in the suit, unless the legislature express a clear intention to vary the relation of litigant parties to each other.

In the present case we should have been glad to come to a different conclusion, but think we are not warranted in doing so, but that the rule for a nonsuit must be absolute.

Rule absolute.

VALLANCE *v.* SIDDELL.

1. The 58 *G.* 3, c. 93, protects bills and notes given for usurious considerations in the hands of an indorsee who discounts or pays other value for such bills and notes at the time of taking them, but not where he receives them for an antecedent debt.

2. The 3 & 4 *W.* 4, s. 7, allowing more than 5*l.* per cent. interest to be taken on bills and notes payable at or within three months after date, extends to notes payable on demand.

ASSUMPSIT on a promissory note for 50*l.*, made by the defendant, payable to one *Joseph Ward* or order, on demand, by *Ward* indorsed to one *Broomhead*, and by *Broomhead* to the plaintiff.

Plea: that before the making of the said note, it was corruptly, and against the form of the statute, agreed between defendant and *Ward*, that *Ward* should lend to defendant 45*l.*, and that defendant should pay *Ward* 5*l.* over and above all lawful interest, for the said loan, for such time as *Ward* should forbear and give day of payment of the same; and that for the securing of the repayment of the said sum of 45*l.*, so to be lent, together with the said further sum of 5*l.*, defendant should make the said promissory note. Averment: that defendant, in pursuance of the said corrupt agreement, made the said note, and that *Ward* lent to defendant a certain sum, to wit, 34*l.* 11*s.* 1*d.*, parcel of the said sum of 45*l.*; and that the said sum of 5*l.*, so agreed to be paid by the defendant, exceeds the rate of 5*l.*, for the forbearing of 100*l.* for a year, contrary to the form of the statute.

Replication: that plaintiff, before the payment of the money specified in the promissory note had been demanded of defendant, became and was the indorsee of the said *Broomhead*, for valuable consideration; that is to say, in part-payment of a certain large sum of money exceeding the money then due and payable on the said promissory note, to wit, the sum of 100*l.*, before then due from *Broomhead* to plaintiff, for work and labour before then done by plaintiff for *Broomhead*, at his request, and for monies paid &c.; that he had not, at the time of doing the said work and labour, or paying the said monies as aforesaid, or at the time of *Broomhead's* indorsing or delivering the said note, or at the time of the plaintiff's accepting or receiving the same, or at any other time before the commencement of this suit, any notice that such note had been given upon the said supposed usurious contract.

Demurrer and joinder.

Cresswell, in support of the demurrer (*a*).—The 58 *Geo.* 3, c. 93, after reciting, that in the course of mercantile transactions, negotiable securities often pass into the hands of persons who have discounted the same, without any knowledge of the original considerations for which the same were given, and that the avoidance of such securities in the hands of such bonâ fide indorsees without notice is attended with great injustice, enacts, that in future no bill of exchange or promissory note that shall be made after the passing of that act, shall, though it may have been given for a usurious consideration, or upon a usurious contract, be void in the hands of an indorsee for valuable

(*a*) In Easter term last, April 25th, before Lord *Denman*, C. J., *Littledale*, *Patteson*, and *Coleridge*, Js.

consideration, unless such indorsee had, at the time of the discounting or paying such consideration for the same, actual notice that such bill or note had been originally given for a usurious consideration, or upon a usurious contract. The protection of this act is extended, as its whole scope and tenor demonstrates, to persons who take bills and notes as negotiable securities, on the faith of their being good, and either discount them or pay valuable consideration at the time of taking them. In this case the creditor gave up nothing for the note; it was taken for an antecedent debt; no consideration was paid for it at the time,—the plaintiff gave no extension of time on the faith of it for payment of the original debt, and was therefore, after taking it, in no worse situation than before. No credit was given to the note as part of the circulating medium of commerce; the plaintiff trusted *Broomhead*, whom he had trusted before. Under the Factor's Act (*a*), an antecedent debt gives no lien upon a consignment, although an advance of money does. The 58 *Geo.* 3, was meant for the validation of bills and notes in their sole character of negotiable securities.

The next statute relied upon by the plaintiff is the 3 & 4 *Will.* 4, c. 98, s. 7, which allows greater interest than 5*l.* per cent. to be taken in respect of bills or notes that are payable at or within three months after date. But this note was payable on demand, and is therefore not entitled to the protection of the act, for no time certain was given to the defendant by the payee of the note by way of consideration, so that the agreement was a mere nudum pactum (*b*).

G. T. White, contrà.—The preamble of the 58 *Geo.* 3, certainly appears to be confined to cases where discount or other valuable consideration is given for bills in the course of mercantile transactions. But the enacting part of the statute is more comprehensive, and provides generally, that bills shall not be void in the hands of indorsees for valuable consideration. The plaintiff was undoubtedly such an indorsee, and gave valuable consideration in the work done for *Broomhead*. *Wright* v. *Nuttall* (*c*), and *Dand* v. *Sexton* (*d*), shew that the enacting parts of a statute may go much beyond its preamble. With respect to the 3 & 4 *Will.* 4, c. 98, it is unreasonable to say that a note payable on demand is not within this act, as being payable at or within three months from its date. Such a note is treated as a note not exceeding two months under the stamp acts (*e*). But it is remarkable that the latter part of the seventh section of this act proceeds, "Nor shall the liability of any party to *any* bill of exchange or promissory note be affected by reason of any statute or law in force for the prevention of usury," without any restriction as to the time within which they are to be payable after date.—[*Patteson*, J. —That must be a misprint. The word "such," referring to the before-mentioned class of bills, must be omitted after "any."]

Cresswell replied. *Cur. adv. vult.*

Lord DENMAN, C. J. now delivered the judgment of the Court, and after

(*a*) 6 *Geo.* 4, c. 94.

(*b*) There was also an argument upon the question subsequently decided in the last case, whether the 5 & 6 *Will.* 4, c. 41, was retrospective or not. But the judgment of the Court in this case renders any report of that part of the argument unnecessary.

(*c*) 10 B. & C. 492.

(*d*) 3 T. R. 37.

(*e*) *Cheetham* v. *Butler*, 5 B. & Ad. 837.

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stating the pleadings, proceeded thus:—Is this replication good, and is the note available in the plaintiff's hands by virtue of the 58 *Geo.* 3, c. 93, an act clearly intended to repeal the provision of the 12 *Ann.* c. 16, which rendered bills and notes, given for usurious consideration, void in the hands of a bonâ fide indorsee for valuable consideration, who had no notice of the usury? The 58 *Geo.* 3, however, does not repeal the statute of *Ann.*, or any one of its provisions, nor indeed does it make any reference to that statute. Does it then, by its direct operation, give validity to bills and notes in this condition? It recites that "in the course of mercantile transactions, negotiable securities often pass into the hands of parties, who have discounted the same, without any knowledge of the original consideration for which the same were given, and the avoidance of such (i. e. usurious) securities in the hands of such bonâ fide indorsees, without notice, is attended with great hardship and injustice." It is difficult to say that the bonâ fide indorsees, protected by this preamble, are other than "parties who have discounted" the negotiable security. The enacting part, however, goes somewhat further: "No bill of exchange or promissory note that shall be drawn or made after the passing of this act, shall, though it may have been given for a usurious consideration, or upon a usurious contract, be void in the hands of an indorsee for valuable consideration, unless such indorsee had, at the time of discounting or paying such valuable consideration for the same, actual notice that such bill of exchange or promissory note had been originally given for a usurious consideration, or upon a usurious contract."

The enactment is not that the security shall not be void in the hands of an indorsee for valuable consideration, who was ignorant of the original vice, but only in the hands of some indorsee who had not actual notice on the occasion described in the act, i. e. the occasion of his discounting the same, or of his paying a valuable consideration for it. Now the bill declared upon was not discounted, nor was a valuable consideration paid for it; the words of this statute, therefore, do not appear to embrace it.

Is it then set up by the seventh section of the act for renewing the privileges of the Bank of England (*a*)? The provision is, "that no bill of exchange or promissory note, made payable at or within three months after the date thereof, or not having more than three months to run (*b*), shall, by reason of any interest taken thereon or secured thereby, or any agreement to pay or receive or allow interest in discounting, negotiating, or transferring, the same, be void." The argument was, that this enactment applied to such bills only as were drawn for a time certain. But though this transaction is wonderfully improvident on the defendant's part, as he may give 5*l.* for the loan of money during a single hour, a bill payable on demand, and which may be enforced instantly, is undoubtedly payable within three months.

We are therefore not compelled to consider another argument raised by Mr. *White* on the same clause, which, after specifically enacting as aforesaid, proceeds to say, "nor shall the liability of any party *to any* bill of exchange or promissory note be affected by reason of any statute or law in force for the prevention of usury." These words are accurately copied in the printed editions from the Parliament Roll, which I have inspected; probably

(*a*) 3 & 4 *W.* 4, c. 98.
(*b*) Extended to bills and notes payable in twelve months, by 1 *Vict.* c. 80.

some restriction will be found inevitable, when they require to be applied in a Court of Justice.

Nor is it necessary to consider the effect of the more recent act of parliament, 5 & 6 *Will.* 4, c. 41, the plaintiff being entitled to our judgment, for the reason above assigned.

Judgment for the plaintiff.

REX *v.* NEWTON, HUNT, and others.

June 3d.

Where a writ of certiorari had been obtained, and the usual recognisances entered into by one only of several defendants, an application for a writ of procedendo, unless the other defendants would appear and plead during the term and take short notice of trial, was refused, although, as the trial could not be pressed on against the other defendants, great delay and the necessity of two distinct trials would ensue.

A Bill of indictment having been found at the Middlesex sessions for a conspiracy, one of the defendants, *Hunt*, had obtained a writ of certiorari to remove the indictment into this Court.

M. Chambers now moved for a rule nisi for a procedendo, unless the other defendants should appear and plead during the present term, and take short notice of trial for the sittings after term. If the rule be not granted, there must be two trials; one of the defendant who has sued out the certiorari and has entered into recognisances, and another of the other defendants, who cannot be pressed on to take their trials at the same time.

The COURT (*a*), (after conferring with the officers of the Crown Office.)—The only instance we are aware of in which terms were imposed upon the defendant who had removed an indictment by certiorari, is the case of *Rex* v. *Hunt* (*b*), under very peculiar circumstances. That case ought not to be made a precedent for an innovation upon the usual practice.

(*a*) Lord *Denman*, C. J., *Littledale* and *Patteson*, Js. (*b*) 3 B. & A. 444.

REX *v.* The Recorder of POOLE.

June 6th.

Notice of appeal against a borough rate, under 5 & 6 *W.* 4, c. 76, s. 92, must either state expressly or impliedly that the appellant is aggrieved. The following notice, therefore, "I, *F. T.*, being a burgess of the borough of &c. and called upon to pay the rate or assessment hereinafter mentioned, do hereby give you notice that I intend to appeal &c.," was held insufficient.

THE following notice of appeal against a borough rate, made by the mayor and council of the borough of Poole, on the 2d of January last, under 5 & 6 *Will.* 4, c. 76, s. 92, was served on the mayor, town clerk, and clerk of the peace, high constable, and the former town clerk of the said borough.

"To the mayor and town council of the borough of Poole. I, *Francis Turner*, being a burgess of the borough of Poole, and called upon to pay the rate or assessment hereinafter mentioned, do hereby give you and each and every of you notice, that I intend to appeal, and shall appeal at the next general quarter sessions of the peace to be holden in and for the said borough, on the 19th day of April next, against a borough rate, at a meeting of the council of the said borough, held on Monday and Tuesday the 2d and 3d of January last, ordered and resolved to be raised for payment of the expenses to be incurred in carrying into effect the provisions of the Municipal Act. Dated, &c."

The appeal was entered with the clerk of the peace, but at the last Lady-day sessions the recorder refused to hear the appeal, on the ground that the notice was insufficient; and also refused to enter and respite the appeal to the next sessions.

King's Bench.

The KING v. The Recorder of POOLE.

A rule nisi having been obtained in Easter term last by *Bingham*, for a mandamus to the recorder to enter continuances and hear the appeal,

Sir *W. Follett* and *Barstow*, on a subsequent day in the same term, showed cause (*a*). The Municipal Corporation Act, 5 & 6 *Will.* 4, c. 76, s. 92, empowers the council of a borough to make a borough rate in the nature of a county rate, and gives any party aggrieved a right of appeal to the recorder at the next quarter sessions for the borough; and such recorder is authorised to determine the same, as in the case of an appeal against a county rate. It may be doubtful whether any *individual* is enabled by this clause to appeal against such a rate, for it is put on the same footing with a county rate, appeals against which can be instituted by none but churchwardens and overseers; and then only when the assessment in a *parish* or *township* is too large.

But the notice of appeal does not state either expressly or impliedly that the appellant is aggrieved, which is absolutely necessary; *Rex* v. *Westmoreland* (*b*) and *Rex* v. *Blackhawton* (*c*), which are cases of appeal against county rates; *Rex* v. *Essex* (*d*) and *Rex* v. *West Riding of Yorkshire* (*e*) are similar authorities upon the Highway acts. *Rex* v. *Somersetshire* (*f*) is quite consistent with the above cases; the appeal was against overseers' accounts under 17 *Geo.* 2, c. 38, s. 4, which, Lord *Tenterden* observes, is very differently worded from the Highway acts, and allows the appeal to a party aggrieved, or to any person having any material objection to the accounts. The notice too in that case set out various items in the accounts and the several objections intended to be made to them. Here it does not appear whether the appellant objects to his own quota or to that of the parish, whether he means to deny his occupancy or to contend that other persons are rated lower than himself. It is necessary that it should appear from the notice that the party himself is aggrieved, whereas he merely states that he is a burgess of the borough.

It is said that the recorder ought to have entered and respited the appeal. But the Municipal Act does not give the power of entering and respiting. The 9 *Geo.* 1, c. 92, s. 8, gives this power in express terms in cases of appeal against orders of removal; this act may have purposely withheld any such power, that it might not be in the hands of any burgess to prevent the levying of the rate. However this may be, an adjournment of the appeal, under the circumstances, was impossible, for the Court was not in possession of it. In *Rex* v. *The Justices of Westmoreland* the sessions had possession of the appeal.

Sir *J. Campbell*, A. G., and *Bingham*, contrà. The Municipal Act allows any party to appeal who *thinks* himself aggrieved: now the mere fact of *Turner* appealing shews that he thought himself aggrieved. It is not objected that the grounds of appeal are omitted, but merely that the appellant has not made the naked assertion, "I thinking myself aggrieved," &c. In *Rex* v. *Justices of Essex* and *Rex* v. *Justices of Westmoreland* it did not appear but that the parties appealing were mere strangers. In *Rex* v. *Blackhawton*, what is said by *Bayley*, J. with respect to notice was not necessary to the decision; and there is a dictum of *Parke*, J., in the same case, that a notice of

(*a*) On May the 5th before Lord *Denman*, C. J., *Littledale*, *Patteson* and *Coleridge*, Js.
(*b*) 10 B. & C. 226.
(*c*) 10 B. & C. 792.
(*d*) 5 B. & C. 431.
(*e*) 7 B. & C. 678.
(*f*) 7 B. & C. 681 n.

appeal is sufficient if it can be collected from it that the party intending to appeal is aggrieved.

The recorder was bound to receive the appeal, and he might afterwards have adjourned the hearing of it or not, at his discretion; *Rex* v. *Justices of Wiltshire*, *Rex* v. *Justices of Westmoreland*.

Cur. adv. vult.

Lord DENMAN, C. J., now delivered the judgment of the Court.—We have given great consideration to the arguments presented to us, and our opinions have somewhat differed at different times, but the result of our deliberation is, that we can put no other meaning on the words of this statute, than that which was put by Lord *Tenterden* and Mr. Justice *Bayley* in the cases which were cited to us in the course of the argument. Therefore we must hold that the notice in this case, not stating that the appellant was a party aggrieved, is insufficient. I state this opinion with some degree of regret, but it is diminished by the consideration, that the omission which renders the notice insufficient might have been easily supplied. The rule must be discharged.

Rule discharged.

GUEST *v.* ELWES (*a*).

June 9th.

Action against the sheriff for an escape. Pleas, not guilty, and that there never had been any arrest of the debtor. At the trial it appeared, that, although the sheriff's officer had made no arrest, he might have made one but for his own negligence. The judge refused to amend, under 3 & 4 *W.* 4, c. 42, s. 23, and the jury having found for the defendant on both issues, the judge directed them to find the facts specially according to the evidence. They then found that there had been a negligent omission to arrest, and assessed damages for the plaintiff 30*l*.

ACTION for an escape against the sheriff of Gloucestershire. Pleas: not guilty, and that there had been no arrest. At the trial it appeared that there had been no arrest, but that an arrest might have been made if the sheriff's officer had not been guilty of negligent omission. The plaintiff then made an application to amend, so as to adapt the declaration to the evidence. The learned judge (*Alderson*, B.) refused the application, but directed the jury to find the facts of the case specially; and they having found that there had been a negligent omission to arrest, and having assessed the damages at 30*l*., he allowed this special finding to be indorsed on the record, under 3 & 4 *Will.* 4, c. 42, s. 24. Verdict for the defendant. In Michaelmas term, 1834, *Talfourd*, Serjt. obtained a rule nisi to set aside this verdict, and to enter judgment for the plaintiff under the above statute. This rule having been made absolute, judgment was entered up according to the finding of the jury. The postea was drawn up as follows:—The jurors upon their oath say, as to the first issue within joined between the parties, that the defendant is not guilty &c.; and as to the other issue within joined between the parties, the jurors aforesaid, upon their oath aforesaid, say, that the defendant did not take and arrest the said *J. H.* in manner and form as the plaintiff hath within in that behalf alleged; and thereupon the said judge, before whom the said issues came on to be tried, to wit, the said Sir *Edward Hall Alderson*, Knt., having, according to the form of the statute in that case made and provided, directed the said jurors to find the facts according to the evidence, the jurors aforesaid, upon their oath aforesaid, did further find

(*a*) See former case of *Guest* v. *Elwes*, 2 Har. & Wol. 34.

This finding having been indorsed on the record, the Court afterwards gave judgment for the plaintiff according to the very right of the case, under sect. 24 of the above act. The postea set out the verdict, the special finding, and the judgment as above, but made no mention of costs:—*Held*, as the plaintiff had succeeded generally, that he should have the costs of the trial, the defendant the costs of the issues, and that each should bear his own costs of the motion and the argument.

and say, according to the form of the said statute, that the defendant had been guilty of a negligent omission to arrest the said *J. H.* within named, and they assessed the damages which the plaintiff had thereby sustained at 30*l.*; and it now appearing to the said Court here that the variance between the mode of stating the cause of action in the declaration within mentioned, and the cause of action as it appeared upon the finding of the said jurors, is immaterial to the merits of the case, and that the misstatement of the cause of action in the said declaration was and is such as could not have prejudiced the defendant in the conduct of the defence to the said action, and that, according to the very right and justice of the case, the plaintiff ought to have judgment to recover his said damages; therefore &c.

On taxation of costs, the Master allowed the plaintiff his full costs, as if he had succeeded on both the issues, and also the costs of the rule to enter up judgment, and did not allow any costs to the defendant. In Michaelmas term, 1836, *W. J. Alexander* obtained a rule nisi for setting aside the taxation, and for taxing the defendant his costs of the cause, or the costs of the issues found for him, and that such costs should be deducted from the plaintiff's damages or damages and costs.

R. V. Richards now shewed cause (*a*).—Although all the issues have formally been found against the plaintiff, yet he has substantially succeeded, and has obtained judgment. Unless he has costs, a consequence will follow quite inconsistent with the result of the action, and a provision of the legislature, expressly intended for the benefit of the party who, independently of all form, substantially prevails, will be defeated by the merest technicality. The Rule of Hilary term, 2 *Will.* 4, No. 74, does not apply, for that rule relates to cases where some of the issues have been found for one party and some for the other. Two counts, one for an escape, and another for not arresting, would not have been permitted in the declaration, because, whether the injury done by the sheriff were in the way of omission or commission, it is in effect the same injury—that he has not *J. H.* in his custody. Suppose the real facts of the case could have been pleaded affirmatively by the defendant, that he had negligently omitted to make an arrest, the plaintiff would have been entitled to costs; why should he not be equally so entitled now that the same facts have been found by the jury?

Sir *W. Follett*, and *W. J. Alexander*, contrà.—The question is, whether costs are to be allowed as a matter of course to the plaintiff, as if there had been no result in the action except the special finding of the jury. An escape after an arrest, and an omission to arrest at all, are substantially distinct causes of action, and might be made the subject of distinct counts; yet the plaintiff allows the defendant to come to trial as if the only matter in dispute was whether there had not been an arrest and a subsequent escape. If the judge had amended the record under the 23d section of the act, he might have directed the costs of the amendment to be paid by the plaintiff; he would have had no power to direct them to be paid by the defendant. The judge did not amend, and referred the case to the Court.—[*Patteson*, J.—The Court has no power to amend.]—It has not.—[*Patteson*, J.—The reason

(*a*) May 24th, before Lord *Denman*, C. J., *Littledale* and *Patteson*, Js. *Williams*, J. sat in the Bail Court during the illness of *Coleridge*, J.

may be, perhaps, that if the Court amended, the issue would become different from that which the jury had tried upon their oaths.]—The case, therefore, is to be dealt with according to the existing state of the record, and under the 24th section, which says nothing about costs.—[*Littledale*, J.—The Court is allowed to give judgment for damages according to the right and justice of the case. When judgment is given for damages, do not costs follow of course under the Statute of Gloucester?]—The jury must find costs. The practice is for them to find costs 40*s.*, and then the Court, on the special circumstances, taxes the costs de incremento. The jury then not having found any costs, the foundation fails upon which the authority of the Court rests to tax the costs de incremento. There are two reports of the previous decision of the Court in this case, one in *Nevile & Manning* (*a*), the other in 2 *Harrison & Wollaston* (*b*). The former report says that costs follow as a matter of course from the judgment, the latter is altogether silent upon the subject of costs. Is the defendant to have no costs at all? Suppose there had been two issues, one on the escape, and one on the omission to arrest, the defendant would have been entitled to costs on the issue as to the escape, although he failed on the other issue as to the omission. Is he now to be in a worse situation, after succeeding on all the issues joined, than he would have been if some other issue had been joined on which he had failed?—[*Patteson*, J. —Does not the 24th section say in effect that the Court may set aside the verdict, for it says the Court may, *notwithstanding the issue*, give judgment &c.? or is not the special finding as much part of the verdict as the finding upon the issues?]—The record is unaltered, and the defendant is entitled to costs under 23 *Hen.* 8, c. 15, s. 1.—[*Patteson*, J.—In *Parry* v. *Fairhurst* (*c*), the Court appears to have amended the record, but their right to do so was not discussed.]—This case is within the Rule of Hil. 2 *Will.* 4, No. 74. That rule is liberally construed; *Doe* v. *Webber* (*d*).

It is submitted that the defendant is entitled to costs, but, at all events, the plaintiff is not entitled. He can hardly be entitled under the Rule of Hilary term, which says, "No costs shall be allowed on taxation to a plaintiff, upon any counts or issues upon which he has not succeeded; or under the Statute of Gloucester, giving the costs of a writ whereon the plaintiff recovers damages, for it cannot be said that any writ has been issued for the cause of action declared upon. The act probably did not intend to give costs, unless the variance were so trifling that the judge would amend at the trial. When the judge amends under section 23, the party on whose behalf the amendment is made, is put in the same situation as if the matter introduced on amendment had been upon the record in the first instance; but section 24 has no such effect.

The plaintiff, even if entitled to the general costs of the cause, can of course have no claim to the costs on the issues joined.

Cur. adv. vult.

Lord DENMAN, C. J. now delivered the judgment of the Court.—The plaintiff declared for an escape, but the evidence not establishing that, he was permitted to go into a case of omission to arrest, and on that new case he

(*a*) 6 N. & M. 433. (*b*) Page 34. (*c*) 2 C. M. & R. 190. (*d*) 2 Ad. & El. 448.

people may have a right to attend the market without paying toll, but not to break the soil without making compensation. In the recent case of *Tyson* v. *Smith* (*a*), a custom for all victuallers to erect stalls at a fair was upheld, but the custom was claimed upon payment of compensation for breaking the soil. In *Prince* v. *Lewis* (*b*), the defendant was held to have a right to sell out of the market, because the market itself had been obstructed by the owner, who applied it to other purposes than those specified in the grant. The defendant has not been obstructed here, and even if he had, it would be no answer to this indictment. If there has been a wrongful removal, his proper remedy is scire facias to repeal the grant.

R. Alexander, and *Bliss*, contrà.—The right of way in the public which this defendant is charged with having obstructed, was originally, as is admitted, subject to the right to attend the market on the same spot, and if the market has not been properly removed, that right still remains. The question therefore to be determined is, whether the old market has been properly removed, the onus of proving which devolves upon the prosecutor. Now in every case which has determined that a right to remove a market exists in the lord, the soil of the new market-place belonged to the lord. This was the case in *Curwen* v. *Salkeld* (*c*), and the same conclusion must be drawn from the judgments of the Court in *Rex* v. *Cotterill* (*d*). In that case Lord *Ellenborough*, after expressing his opinion that a power of removal is incident to the grant, qualifies it by the condition "provided such removal be not prejudicial to the object of the grant;" from which it must be inferred that no removal is valid unless thereby equal accommodation is secured to parties frequenting the market. Here no evidence whatever was given that equal accommodation was secured; and as the soil of the new market-place was not in the lord, it is clear there was no security for such accommodation. In *Prince* v. *Lewis* (*b*), want of accommodation in the market was held to be an answer to an action for selling in the neighbourhood of the market. In *Mosley* v. *Walker* (*e*), *Bayley*, J. thus lays down the law:—"I take it to be implied in the terms in which a market is granted, that the grantee, if he confine it to particular parts within a town, shall fix it in such parts as will from time to time yield to the public reasonable accommodation; and that if the place once allotted ceases to give reasonable accommodation, he is bound, if he has land of his own, to appropriate land on which to hold it; or, if not, to get land from other people, in order that the market, which was originally granted for the benefit of the public, as well as for the benefit of the grantee, may be effectually held; and that the public may have the benefit which it was originally intended they should derive from it." Now it cannot be said that in this case the public would have enjoyed equal benefit after the change. By the lease the lessees had the right to impose a toll to deny entrance to any parties not paying it; none of these exactions or restrictions existed in the old market.—[*Littledale*, J.—I find from the form of declaration, which is given in *Mosley* v. *Walker*, that the lord must aver that he has and of right ought to have the correction of the market. I do not see how Lord *Burlington* could have proved that he possessed that power after the removal.]

(*a*) *Ante*, 288.
(*b*) 5 B. & C. 363.
(*c*) 3 East, 538.
(*d*) 1 B. & A. 67.
(*e*) 7 B. & C. 40.

—He has deprived himself of all such power. Now the duty of the lord to correct and regulate the market is inseparable from his right to the profits of it. It is true that the lessees covenant to keep the market open, but that covenant only confers a right of action, in case of breach, to Lord *Burlington*; the parties attending the market are entitled to further protection. It is not necessary to proceed by scire facias; if the market has not been lawfully removed, the old rights of the public remained, and therefore the defendant committed no offence in frequenting the old market; *Rex* v. *Smith* (*a*), *Holcroft* v. *Heel* (*b*).

Lord DENMAN, C. J.—This is an indictment for a nuisance in obstructing a highway by erecting stalls &c. upon it. Now it appears that the spot in question was the site of an ancient market; the defendant, therefore, was justified in creating these obstructions, unless the market has been rightfully removed; and the only question which we have to consider is, whether the removal of this market has been legal or not. I am of opinion, that, if the removal has been so made as to deprive the public of any rights which they before enjoyed, it is not valid in law. Without considering the general effect of the lease, or the consequences of taking the property in the soil out of the lord, I think there is one clause in the lease which authorises so direct an encroachment on the rights of the public, that it is impossible to say there has been a legal removal. The clause in question, after a covenant by the lessees that the premises in question shall be open for public resort, and the purpose of a market on market days, thus continues,—"But nevertheless, with full power, liberty, and authority for the lessees to make all such orders and regulations for the maintenance and good management of the markets, and the renting of the stalls or other conveniences thereof, and imposing rents or other sums, and as for license and permission of vending, selling, or exposing goods to sale on the said premises, to deny entrance to the said premises for any such purpose to all persons not so authorised." An entirely discretionary power is therefore entrusted to the lessees, of imposing such rents as they please upon all persons erecting stalls; and finally, of wholly excluding from the market all persons who shall not pay whatever may be demanded for the liberty of selling therein. By this clause such power is expressly granted, although it is not in evidence that any sum at all had ever before been paid, and although the freedom from such payment is so essential a part of the former privilege. I expected to find a final covenant that all things should be done by the lessees relating to the market, in the same manner as they had heretofore been done by the lord. However none such occurs; and it is not clear even with respect to stallage, which it seems must be a sum certain, that the lord himself would have any right to it in this case, where so long a time has elapsed without his demanding it. It should be remembered that a grant of a market is a thing beneficial in itself to the grantee, though no tolls are paid to him; many markets are wholly free from such payment. On these grounds, I am of opinion that the removal of this market was not well made, and that, as the old market remained still in existence, no nuisance has been committed by the defendant.

(*a*) 4 Esp. 111. (*b*) 1 B. & P. 400.

King's Bench.

The KING v. STARKEY.

LITTLEDALE, J.—I am of the same opinion. Even if this lease had conveyed to the lessees the same powers only which were possessed by the lord, the removal of this market would still not have been good; because the property in the soil no longer remained in the lord. This is altogether a different case from that cited by Mr. *Wightman*, where, although the soil does descend to the younger son in borough English, he still takes it subject to the market, which passes to the heir-at-law with full power to correct and regulate it. It is one part of the duty of the lord to correct the market; now how can he be said to be in a situation to perform that duty towards the public when the property in the soil is no longer in him? The lessees in this case might convert the site of the new market to any other purpose whatever, subject only to an action upon their covenant at the suit of Lord *Burlington*. There is nothing to authorise him so to deprive the public of those remedies to which they are lawfully entitled in case of such misappropriation. From the passage in the judgment of *Bayley*, J., which has already been cited, it appears to have been his opinion that no removal of a market to a place not upon the soil of the lord is good, and from the averments which appear in the declaration in that case, it is clear that no action for disturbance of a market could be supported, unless it appeared that the right to correct the market was in the lord. I think, therefore, that this removal is bad.

PATTESON, J.—The single question in this case is, whether the market has been well removed or not, and upon one short ground I am of opinion that it has not. It is quite clear that no market can be rightfully removed unless the new market is altogether as free and unrestricted as the old. Now in this case it appears that no toll whatever was demanded in the old market. Whether or not the lord could have supported any claim there for stallage, I do not now profess to determine either one way or the other. But with respect to the new market, a very different claim is introduced, for he distinctly, in direct terms, authorises these trustees to impose a toll on all goods sold. The words of the lease as to this point are clear. The lessees first covenant to appropriate the premises "for a general market, and for buying, selling &c., *as now used*." Had this been all, some question might have arisen as to the validity of the removal. But the lease, after referring to the days on which markets were to be held, contains a covenant that the market shall be open for buyers, and the covenant is confined to buyers only; and then states, that nevertheless the lessees shall have full power to impose rents and other sums for the use of stalls &c., and for license and permission to sell &c., and to exclude all persons from selling in the market who have not become authorised to do so by paying such demands. Now as none such were ever made in the old market, it is clear that the new market was not the same free and open market which the old one was, and therefore I think there has been no legal removal.

Rule absolute (*a*).

(*a*) *Williams*, J. delivered no opinion, not having been present throughout the whole of the argument.

SANDERSON *v.* BROWN.

June 10th.

Under Rule H. T. 2 W. 4, No. 81, judgment cannot be signed against country bail until eight days from the return of the scire facias, although notice of the writ has been given to the bail, and then only by leave of the Court.

BUSBY, in Hilary term last, obtained a rule nisi to enter an exoneretur on the bail-piece in this case. The question was, whether the defendant had been rendered in time. Judgment had been signed against him on the 27th July, 1836, and a ca. sa. was duly issued, and returned non est inventus on the 9th November. On the 14th November a scire facias, returnable on the 19th, was sued out against the bail; of which they had notice, at their residence in Yorkshire, on Friday 18th November. The next day was not a post-day, but on Sunday the 20th they wrote to London for a judge's order to render the defendant. The order arrived in Yorkshire on the 24th, and the defendant was rendered the same day.

Knowles shewed cause (*a*).—By Rule 81, H. T. 2 *W.* 4, no judgment shall be signed for non-appearance to a scire facias without leave of the Court or a judge, unless the defendant has been summoned; but such judgment may be signed by leave after eight days from the return of one scire facias. The previous practice of this Court is explained by Lord *Kenyon*, C. J., in *Clarke* v. *Bradshaw* (*b*). Whatever time, he says, the bail are allowed after return of the *capias* to render their principal, is by the indulgence of this Court; "this is either upon two writs of scire facias returned nihil upon each, or upon one scire facias and a summons, and a return of scire feci after the writ has lain a certain time in the office. The bail are bound to watch these proceedings, and to have their principal ready to render at the plaintiff's call. Indeed, unless they live in Middlesex, how can the sheriff serve the bail with notice?" The new rule merely substitutes one scire facias for two, and does not require that notice of the writ should be given to the bail; the summons spoken of applies, as before the rule, to Middlesex bail only, who might be fixed if summoned before the rising of the Court on the return-day of the writ; *Clarke* v. *Bradshaw*, recognised in *Lewis* v. *Pine* (*c*). By Rule 3 of T. T. 3 *W.* 4, where the plaintiff brings debt against the bail, they have fourteen days after service of process to render their principal; but that rule has no application to proceedings by scire facias. It will be contended on the other side, that the bail have eight days to render after the return of the scire facias; that may be so where no notice has been given them; but here notice was given, according to the practice spoken of by Lord *Kenyon*, when one writ only was sued out, and that writ also lay in the office the full time referred to by him as necessary before judgment could be signed, namely, four clear days.

Busby, contrà.—Judgment against bail cannot be signed until eight days after the return of the writ, and then only by leave of the Court, except in one case, that is, where they have been summoned. Judgment, therefore, has been prematurely signed, unless the notice of the 18th November is equivalent to the summons spoken of by the rule, which cannot be the case, because summons applies to Middlesex bail only. He cited also *Thorn* v. *Hutchinson* (*d*).

(*a*) The last day of Hilary term.
(*b*) 1 East, 86.
(*c*) 2 Dowl. P. C. 133.
(*d*) 3 B. & C. 112.

King's Bench.

SANDERSON v. BROWN.

Lord DENMAN, C. J., on this day delivered the judgment of the Court.—The question turns on the Rule of H. T. 2 *W.* 4, No. 81. Before and since that rule, if the bail be summoned, (which can only be in Middlesex, where the scire facias must be brought,) the defendant must be rendered before the shutting of the office on the day of the return of one scire facias. Where the bail reside elsewhere, the practice of suing out two writs of scire facias is done away by the above rule; and an application to the Court or a judge, after eight days from the return of one writ, for leave to sign judgment, is substituted. Before such leave is given, it must be proved that notice has been given to the bail, or that proper endeavours have been made to do so without effect. The object of that notice is to enable the bail to render the defendant; and accordingly it is stated in a note to Mr. *Jervis*'s New Rules, p. 64, 3d edit., that *Bayley*, B. in a case of *Newton* v. *Flight*, MS. 23d June, 1832, at chambers, held, that where no notice had been given, a render fourteen days after the return of the writ was in time. Here notice was given in Yorkshire the day before the return of the writ, but that notice is not the same thing as a summons in Middlesex. It would have entitled the plaintiff to obtain leave to sign judgment after eight days from the return-day, if nothing had been done in the meantime; but we are of opinion that those eight days were given for the very purpose of enabling bail to render, though the rule is not confined to proceedings against bail. It would be very strange if it were otherwise, for then the bail would be placed in a worse situation by the rule in question than they were before; and if the plaintiff proceeds by action, they have fourteen days from the service of the writ to render, by Rule 3 T. T. 3 *W.* 4.

For these reasons we think that the present rule must be made absolute.

Rule absolute.

MORTON *v.* BURN and another.

May 25th.

Forbearance for a given time, according to agreement, by the assignee of a bond to sue the obligors, is a good consideration for their promise to pay him at the expiration of that time, or give him a warrant of attorney for the amount.

ASSUMPSIT. The declaration stated, that whereas before the commencement of this suit, and before and at the time of making the promise hereinafter mentioned, to wit, &c., the defendants were indebted to the plaintiff in the sum of 728*l.* 2*s.* 6*d.*, under and by virtue of a certain bond, dated the 14th day of July, 1832, and a certain indenture or deed of assignment thereof, dated 19th October, 1833; and whereas also, according to the condition of the said bond, the sum of 228*l.* 2*s.* 6*d.*, part of the said sum of 728*l.* 2*s.* 6*d.*, ought to have been paid on the 1st day of February then last past, and thereupon, in consideration of the premises, and also in consideration that the plaintiff would accept and receive payment of the said sums of money on the days and times hereinafter mentioned, and that in the meantime the plaintiff would give time to the defendants for payment thereof, the defendants undertook and promised the plaintiff that the whole of the sum of 228*l.* 2*s.* 6*d.*, with interest thereon from the 1st of February then last, should be paid to the plaintiff on or before the 1st of June then next, or in default thereof, that the said defendants would sign a warrant of attorney to enable the plaintiff to enter up judgment against them forthwith for the same, and that they would pay to the plaintiff the sum of 50*l.* quarterly, on the 1st

day of September, the 1st day of December, the 1st day of March, and the 1st day of June in every year, until the further sum of 500*l.*, residue of the sum of 728*l.* 2*s.* 6*d.*, together with interest thereon, at the rate of 5*l.* per cent. per annum, from the 1st day of February then last, should be fully paid and satisfied; and in default of paying any of the last-mentioned instalments, they, the defendants, would execute a warrant of attorney to enable the plaintiff forthwith to enter up judgment against the defendants for the whole sum of 500*l.* and interest, or so much thereof as might then remain due; and the plaintiff avers, that he did forbear and give time to the defendants for the payment of the said sum of 728*l.* 2*s.* 6*d.* and interest, until and upon the respective days and times mentioned for payment thereof in the said promise and undertaking of the defendants; and although the defendants paid to the plaintiff the sum of 228*l.* 2*s.* 6*d.*, and interest thereon, yet the defendants did not nor would pay to the plaintiff 50*l.* quarterly, on the days and times above mentioned in that behalf, but therein wholly made default, and a large sum of money of the said instalments, to wit, the sum of 250*l.*, being for the five sums of 50*l.* each, which respectively became due on &c., now is wholly due, in arrear and unpaid from the defendants to the plaintiff; and although the said defendants made default in payment of the respective sums on the days and times aforesaid, contrary to the tenor and effect of the said promise of the defendants; yet the defendants did not nor would execute a warrant of attorney to enable the plaintiff forthwith to enter up judgment against the defendants for so much of the said sum of 500*l.* and interest as then remained due, but to do this the defendants have, and each of them hath wholly refused.

The cause was tried at the Middlesex sittings after last Michaelmas term, and a verdict having been found for the plaintiff, speedy execution was allowed under 1 *Will.* 4, c. 7, s. 2.

In Hilary term last, *Edwards* obtained a rule nisi for setting aside the execution and arresting the judgment, on the ground that the declaration did not set out any consideration for the defendants' promise. He cited *Mowse* v. *Edney* (*a*), *Potter* v. *Turnor* (*b*) and *Anon.* (*c*).

Cresswell and *W. H. Watson* showed cause. Two objections were made at the trial, that the action should have been debt on the bond; and that there is no consideration for the promise. The two objections resolve themselves into one, for if there was a good consideration for the promise, then the form of the present action is correct. The right of the assignee of a bond to sue the obligor at law in the name of the obligee, has been repeatedly recognised, and in such an action the Court has gone so far as to set aside a plea that the defendant had been released by the obligee; *Legh* v. *Legh* (*d*). The assignee of a bond has also a clear right to sue upon it in equity in his own name, and the forbearance by the plaintiff in this case to enforce either his legal or equitable remedy upon the bond is a good consideration for the defendants' promise; *Forth* v. *Stanton* (*e*); in the note to which by Serjt. *Williams*, it is said, that though *Potter* v. *Turnor* was decided to the contrary, that it is contradicted by all the authorities. Forbearance to an executor is

(*a*) 1 Rol. Abr. 20, pl. 12.
(*b*) Winch, 7. *S. C.* Palmer, 185.
(*c*) Cowp. 128.
(*d*) 1 Bos. & Pul. 447.
(*e*) 1 Wms. Saund. 210, n. (a).

sufficient to support assumpsit against him upon a promise to pay testator's debt; *Com. Dig.* "Action upon the Case upon Assumpsit, Consideration (B 1);" and a little further on, under the same head, occurs this passage: "So in consideration of the forbearance of a suit against an heir upon a bond of his ancestor, if he was bound and had assets," a promise is good; and again, "so in consideration of forbearance by the assignee of a bond, if he has a letter to sue and release;" which are the very cases of forbearance supporting assumpsit, although the principal debts were due on bond. In *Mowse* v. *Edney* (*a*) it does not appear that the assignee forbore beyond the time of payment mentioned in the bond. In *Pitt* v. *Bridgewater*, which is the placitum immediately preceding the last cited, it is said that forbearance by the assignee of a debt, having a letter of attorney to sue, is a good consideration; *Willmott* v. *Priggett* (*b*) and *Russell* v. *Haddock* (*c*) are also authorities on the same points.

Edwards contrà. There is no consideration for the promise in this case, simply because the *agreement* to forbear was not *binding* at the time it was made. The plaintiff might have sued defendant immediately afterwards, either at law or in equity; in law, because the parol agreement to give time to pay a bond debt, would be of course nugatory; and in equity, because the defendants promise to do that which they were already bound to do at the time of the agreement, namely, to pay the amount of the bond, could be no consideration for the plaintiff's agreement to forbear; *Harris* v. *Watson* (*d*), *Stilk* v. *Myrick* (*e*). The plaintiff therefore not being bound, the defendants were not bound; *Lees* v. *Whitcomb* (*f*), *Mowse* v. *Edney*, and *Potter* v. *Turnor* are quite in point. The latter case may be much weakened by *Fenner* v. *Meares* (*g*), but was in principle upheld by Lord *Kenyon* in *Johnson* v. *Collings* (*h*) and *Williams* v. *Everitt* (*i*), where he seems to dissent from the authority of *Fenner* v. *Meares*.

This may be considered as a parol agreement to vary the terms of a deed; it purports to give a release, as it were, up to a certain day, the day of forbearance; if that may be done, why may not a parol release altogether be good? It may also be contended that if the consideration for the defendant's promise is good, the plaintiff would have two causes of action against him; and if the defendant, after paying the debt in an action on this agreement, might afterwards be sued on the bond, it would be impossible for the defendant to show that the agreement was made in respect of the identical bond.

Cur. adv. vult.

Lord DENMAN, C. J., on a subsequent day in this term, delivered the judgment of the Court:—This was a motion in arrest of judgment. The question is, whether forbearance for a given time, on the part of the assignee of a bond, to sue the obligors, is a good consideration for a promise by the obligors to pay the assignee at the expiration of that time, or give him a warrant of attorney for the amount.

(*a*) 1 Rol. Abr. 20, pl. 12.
(*b*) 1 Rol. Abr. 29, pl. 60.
(*c*) 1 Lev. 188.
(*d*) Peake's N. P. C. 72.
(*e*) 2 Campb. 317.
(*f*) 5 Bing. 34.
(*g*) 2 W. Bla. 1269.
(*h*) 1 East, 98.
(*i*) 14 East, 302.

It was objected, that there is no mutuality in the agreement, for that if the plaintiff had sued the defendants in the obligee's name, the promise to forbear would be no answer. Again, that this is a mere nudum pactum, being only a promise to do that which the defendants were already bound to do by their bond. And further, that if this promise be binding, it amounts to varying a deed by parol contract, which is contrary to the rules of law.

We do not think any of these objections sufficient to arrest the judgment.

As to the first, there is sufficient mutuality, for although the agreement to forbear would not be pleadable to an action in the name of the obligee, yet, unless the plaintiff did forbear, according to his agreement, he would not be able to sue on the defendants' promise; he is obliged to aver, as he does in the present declaration, that he has forborne, which is a condition precedent to his suing.

As to the second objection, this is not a mere nudum pactum, for the defendants promise to pay the plaintiff, a third person, whom they were not bound to pay by their bond, and they promise in consideration of a detriment sustained by the plaintiff, at their request, namely, a forbearance to enforce his right in the name of the obligee.

As to the third objection, the bond is in no respect varied by this agreement; the new contract entered into by defendants with the plaintiff leaves the bond just as it was before: it was forfeited before the agreement, and so it remains, and the agreement would be no answer to an action on it.

The cases on this subject are collected in Mr. Serjeant *Williams*'s notes to *Forth* v. *Stanton* (*a*) and to *Barber* v. *Fox* (*b*), to which may be added *Yard* v. *Eland* (*c*), and other cases collected in *Com. Dig.* Action on the Case sur Assumpsit, Consideration (B).

They are all in favour of the action lying, with the exception of *Potter* v. *Turnor* (*d*), which we think inconsistent, not only with the current authorities, but with established principles. For these reasons we are of opinion, that the rule to arrest the judgment in this case must be discharged.

Rule discharged.

(*a*) 1 Wms. Saund. 210, n. (1).
(*b*) 2 Wms. Saund. 137, n. (2).
(*c*) 1 Lord Raym. 368.
(*d*) Winch, 7. *S. C.* Palm. Rep. 185.

BOWEN *v.* JENKINS.

May 31*st.*

To a declaration in case for disturbance of the plaintiff's common, by putting on divers cattle, the defendant pleaded a right of common, and that the said cattle were his own commonable cattle. The plaintiff replied that all the said cattle in the declaration mentioned were not the defendant's own commonable cattle in manner and form as in the plea alleged:—*Held*, that under this replication the plaintiff could not give evidence of a surcharge by the defendant, which should have been the subject of a new assignment.

CASE for disturbance of common, by putting on divers cattle in and upon plaintiff's common, at divers days, and keeping the same there respectively as aforesaid. Plea, first, traversing the plaintiff's right of common; second, that before and at the said several times, when, &c., defendant was possessed of certain land, with the appurtenances, situate &c., and that the occupiers of the said land, with the appurtenances, now have, and for and during the period of sixty years and upwards next before the commencement of this suit, without interruption, have had and used, and without interruption and of right ought to have and use, &c., and the defendant, as

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occupier of the said land, of right ought to have and use common of pasture upon the said place called "The Golden Mile Common," for all his and their commonable cattle, levant and couchant, in and upon the said land; and the defendant, being so possessed and so entitled, &c. afterwards, and at the said several times when &c., in the said declaration mentioned, put and caused to be put the said cattle in the said declaration mentioned, being the defendant's own commonable cattle, levant and couchant, in and upon the said land, with the appurtenances of the said defendant, to use the said common of pasture of the said defendant there, and kept and detained the same there for the said space of time in the said declaration mentioned, for the purpose aforesaid, as he lawfully might for the cause aforesaid, which is the same putting and causing to be put, and keeping and detaining of the said cattle in and upon the said waste or common, called "The Golden Mile Common," as in the said declaration mentioned, and whereof the said plaintiff hath above complained against the said defendant; and this the said defendant is ready to verify.

Replication, to the first plea, similiter. To the second plea, that all the said cattle in the said declaration mentioned, at the said several times when &c., were not the said defendant's own commonable cattle, levant and couchant, in and upon the said land of the defendant in manner and form as the said defendant hath above in his said plea thereof alleged; concluding to the country.

At the trial before *Patteson*, J. it was admitted by the plaintiff, that at the times when &c. the defendant had the right of common for his cattle levant and couchant, but it was stated that he had surcharged.

The learned judge, thinking that a case of surcharge should have been made the subject of a new assignment, directed a verdict for the defendant.

J. Evans, in Michaelmas term 1835, having obtained a rule nisi for a new trial, on the ground that evidence of surcharge should have been received;

E. V. Williams shewed cause (*a*). It was necessary for the plaintiff to new assign in order to render evidence of surcharge admissible. At the trial a note by Serjt. *Williams* to *Mellor* v. *Spateman* (*b*) was read, in which he says, "If the lord should bring an action of trespass quare clausum fregit, instead of distraining, and the defendant should prescribe for common for his cattle levant and couchant, and aver that he put the cattle mentioned in the declaration being his commonable cattle levant and couchant on his land into the common, in case some of the cattle were not levant and couchant, it should seem the plaintiff should new assign the trespass, by stating that he brought the action for depasturing the common with other cattle, and not traverse the levancy and couchancy. For in trespass it is sufficient for the defendant to shew anything which excuses the trespass, and the number mentioned in the declaration is not material." For this doctrine he cites *Ellis* v. *Rowles* (*c*). It must be admitted that his doctrine is not borne out by the above case, but it is nevertheless correct, and the result of all the authorities on the subject. The disturbance of the right of common is the gist of the action, so much so

(*a*) In Easter term, May 1, before Lord *Denman*, C. J., *Littledale*, *Patteson*, and *Coleridge*, Js.

(*b*) 1 Wms. Saund. 346, e.

(*c*) Willes, 638.

that the practice used to be to state the disturbance generally without specifying any particular mode. The same general declaration was used in trespass quare clausum fregit, on which account, according to Serjt. *Williams* in a note to *Green* v. *Jones* (*a*), the plea of liberum tenementum was allowed, which always drove the plaintiff to a new assignment; because if he traversed it without new assigning he ran great risk, for he would fail on that issue if the defendant had any part of his land in the vill. In the same note it is said, a new assignment is used where the plea covers the whole trespass, but mistakes it, and does not hit the whole or some part of the trespass intended in the declaration. Here the whole trespass is covered by the plea, the plaintiff ought therefore to have explained by new assigning that he did not bring his action for the trespass by the commonable but by the non-commonable cattle. Thus in *Montprivatt* v. *Smith* (*b*) in which, to trespass for breaking and entering a house and staying therein three weeks, the defendant pleaded a justification as to the breaking and entering and staying in the house twenty-four hours; it was held, that the plea covered the whole declaration, and that any excess beyond the time justified should have formed the subject of a new assignment. The case of *Barnes* v. *Hunt* (*c*) may be cited against this doctrine, but is distinguishable: to a declaration for several trespasses on divers days the defendant pleaded leave and license, and under the replication de injuriâ the plaintiff was allowed to give evidence of a trespass committed prior to the license. It is not necessary to dispute the authority of that case; for wherever, as in *Barnes* v. *Hunt*, the declaration contains several counts for distinct trespasses, a plea of leave and license must be supported by shewing a license co-extensive with the trespasses charged in the several counts, and the plaintiff need not new assign; but it is otherwise where the trespass is one continuing trespass, and the plaintiff relies upon an excess not covered by the justification in the plea; *Lambert* v. *Hodgson* (*d*).

In some of the cases cited in *Saunders*, the replication was de injuriâ, and it may be said that this makes a difference. Now if the replication means that none of the defendant's cattle were levant and couchant, it is much the same as de injuriâ; if, on the other hand, it means that some of the cattle were commonable and some not, it then falls short of de injuriâ, and new assignment is the more necessary, otherwise the plaintiff admits that he has brought his action for some trespasses for which no action lies. In some cases the replication, though it does not in form new assign, answers the same purpose, as in the *Six Carpenters'* case (*e*), where an abuse of the law is replied, for the purpose of shewing that some subsequent act has made the defendant a trespasser ab initio.—[Lord *Denman*, C. J.—*Sloper* v. *Allen* (*f*) seems against you.]—That was replevin for taking a definite number of sheep, in which the asportation is the gist of the action; and according to the report in *Brownlow*, the plaintiff had judgment.

Evans and *Nicholl*, contrà. The levancy and couchancy is a material allegation in defendant's plea, and he should have pleaded, as in *Mellor* v. *Spateman* (*g*), a right of common as to some, and the general issue as to the rest.

(*a*) 1 Wms. Saunders, 299 b, (n. 6).
(*b*) 2 Campb. 173, and see the note.
(*c*) 11 East, 451.
(*d*) 1 Bing. 317; and see Bull. N. P. 17.
(*e*) 8 Coke, 146 a.
(*f*) Brownl. 171. *S. C.* Roll. Abr. Trial, Verdict, pl. 41.
(*g*) 1 Saund. 342, a

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In the present state of the record the issue is as to all the cattle; the plea attempts to justify the trespasses by all the cattle mentioned in the declaration, and the plaintiff traverses all justified by the plea; the issue then is on the whole.—[*Patteson*, J.—It comes to this, you say they undertake to prove all were commonable, and they say you undertake to prove that none were.] The justification is co-extensive with the complaint; *Barnes* v. *Hunt* is an authority therefore to shew that a new assignment was not required.—[*Littledale*, J.—Suppose in trespass a right of way pleaded, you must new assign in order to shew a trespass extra viam.] The allegations in this replication may, under the rules of H. T. 4 *Will.* 4, in Trespass, r. 6, be taken distributively, so as to give it the character of a new assignment.—[*Littledale*, J.—The object of that rule is to enable the jury to find under one plea distributively what would have been the subject of several pleas before the new rules.] *Sloper* v. *Allen* is directly in point.

Lord DENMAN, C. J., on this day delivered the judgment of the Court:—This was an action on the case for disturbing the plaintiff's right of common, by turning on cattle on divers days and times. The defendant pleaded a right of common in himself, and justified turning on the cattle mentioned in the declaration, being his own commonable cattle levant and couchant on his land, which are the same supposed trespasses in the declaration mentioned.

The plaintiff replied, that all the cattle mentioned in the declaration were not the defendant's cattle levant and couchant modo et formâ.

Upon the plaintiff's opening, it was admitted by his counsel that on the days and times some of the cattle turned on were levant and couchant, and that the action was for surcharging.

The learned judge thought that the surcharging ought to have been newly assigned, and refused to receive any evidence respecting it, directing the jury, upon the admitted facts, to find a verdict for the defendant. We are of opinion that he was right in so doing, and that this rule for a new trial must be discharged. The case of *Ellis* v. *Rowles* (*a*) was cited and relied on at the trial, but appears not to be in point. It is quoted in a note of Mr. Serjt. *Williams* to *Mellor* v. *Spateman* (*b*), as if it were an authority for a position there laid down, viz. "that if a lord bring trespass, and the defendant should prescribe for common for his cattle levant and couchant, and aver that he put the cattle mentioned in the declaration, being his commonable cattle levant and couchant on his land, into the common, in case some of the cattle were not levant and couchant, it should seem the plaintiff should new assign the trespass, by saying that he brought his action for depasturing the common with other cattle, and not traverse the levancy and couchancy; for in trespass it is sufficient for the defendant to shew any thing which excuses the trespass, and the number mentioned in the declaration is not material." But the passage stood in the first edition, without any authority cited to support it, as an observation of the editor himself, and the case was added in a subsequent edition, as bearing upon, though not expressly involving, the point. If the position be good law, it applies equally to a plea in an action on the case by a commoner, in which, though for some time before the new rules such defence would have been given in evidence under the plea of not

(*a*) Willes, 638. (*b*) 1 Wms. Saunders, 346, c. (n. 2.)

guilty, yet formerly it used to be pleaded specially. (See the former part of the note.)

Now the precise number mentioned in the declaration being immaterial, the defendant was at liberty to apply his justification of right of common to any number of cattle that he pleased, and to aver that those cattle were levant and couchant, and that the supposed grievances with them were the grievances alleged in the declaration. The plaintiff, by his replication, admits the right of common set up by the defendant, and that the cattle in the plea are the same as those in the declaration, but traverses that all the cattle in the declaration were levant and couchant. This does not make the precise number material; and as it was conceded that on every occasion some of the cattle were levant and couchant, the defendant is entitled to apply his plea to them both by way of allegation and proof at the trial, since he has asserted by his plea that those are the cattle mentioned in the declaration, and that assertion has not been denied. If the plaintiff had stated in his declaration, as he might have done, though he was not bound to do, that the defendant, being a commoner, had put in cattle which were not levant and couchant, and the defendant had asserted in his plea that they were levant and couchant, doubtless he must fail, unless he could prove by his evidence that all the cattle plaintiff proved to have been put on the common by him were levant and couchant. This also shews that the case of *Barnes* v. *Hunt* (*a*) does not apply, for there the license pleaded was wholly inapplicable to all the trespasses proved on one particular day.

Such would have been the state of things if the replication had merely traversed that "the cattle in the plea mentioned," or, "the said cattle," were levant and couchant; but the language of it is, that all the cattle in the declaration mentioned were not the defendant's own commonable cattle levant and couchant on his land.

On this replication a question arises, whether the word "all" alters the meaning of the issue tendered. The replication either means that none of the cattle mentioned in the declaration were levant and couchant, or it means that some were and some were not. Now, if it means the former, it is properly taken as an issue, concluding to the country, for such is unquestionably the meaning of the plea, and the issue can only be properly taken by pursuing the meaning of the plea. Again, this would cause no inconsistency in the plaintiff's pleadings, because he would only then be averring that defendant had no cattle levant and couchant, which is the apparent meaning of the declaration.

But if the replication have the latter meaning, then it is faulty in two respects; first, that it traverses the plea in a sense manifestly not intended by the plea; and, secondly, that it asserts that some of the cattle in the declaration mentioned were levant and couchant on the defendant's premises, who had a right of common, and so shews that the action is brought in respect of cattle for which it will not lie, and that the defendant is entitled to a verdict pro tanto, and yet not shewing for how much. This is absurd, and therefore the plaintiff is driven to say, that the word "all" is equivalent to a new assignment, and amounts to the same thing as if the replication had averred expressly that the action was brought, not in respect of the cattle levant and couchant, but in respect of others that were not levant and couchant.

(*a*) 11 East, 451.

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We think that the word "all," being in the replication quite ambiguous, must be taken most strongly against the party pleading, and that it must be taken that the traverse, concluding to the country, takes issue only on the allegations of the plea according to the meaning of that plea; consequently it does not amount to a new assignment, but is only a denial that any cattle of the defendant's were levant and couchant; and the learned judge was right in telling the jury, that, as it was admitted that in all the instances some of the cattle were levant and couchant, the verdict must be for the defendant. The present rule must be discharged.

Rule discharged.

GRUGEON *v.* SMITH (*a*).

"Bill for &c., due on &c., drawn by &c., *is this day returned with charges, to which your immediate attention is requested,*" is a sufficient notice to a drawer of a bill of exchange of its dishonour by the acceptor.

INDORSEE of a bill of exchange against the drawer. Plea: that defendant had not received due notice of its dishonour by the acceptor. At the trial before *Patteson*, J., at the Liverpool Spring Assizes 1837, a notice was proved to have been sent to the defendant, which, after describing the bill by its amount, the day on which it became due, and the name of the defendant as drawer, proceeded, "Is this day returned with charges, to which your immediate attention is requested." It was submitted, on the authority of *Solarte* v. *Palmer* (*b*), that this notice was insufficient, but the learned judge held otherwise; and a verdict was given for the plaintiff, with leave to move to enter a nonsuit.

Murphy, in Easter term following, moved accordingly, and cited *Solarte* v. *Palmer*.

Per Curiam.—This is a very different case from *Solarte* v. *Palmer*. There the notice contained no intimation that the acceptor had not paid the bill; but here this intimation is plainly given by the phrase, "returned with charges."

Rule refused.

(*a*) Decided April 19. (*b*) 1 Bing. N. C. 194.

WILKES *v.* OTTLEY.

June 10.

1. Defendant, in an action of debt, whose time for pleading expired on May 20th, delivered on that day several pleas, accompanied by a rule to plead several matters, returnable at three o'clock the 22d, on which day, at 11 o'clock, plaintiff signed judgment. The Court set aside the judgment without costs.

2. After judgment had been signed in debt for want of a plea, the defendant, who had moved to set aside the judgment, before the rule was disposed of, obtained a judge's order to plead several matters, that his pleas might be in readiness to prevent the signing of a second judgment for want of a plea, in case the first should be set aside. The Court set aside the order without costs.

TYRWHITT obtained a rule nisi for setting aside a judgment signed in an action of debt, for want of a plea. The time for pleading expired on the 20th May, when the defendant delivered to the plaintiff several pleas, with a summons, returnable on May 22d, for leave to plead several matters. The plaintiff however refused the pleas, and signed judgment at 11 o'clock on the 22d. After the above rule had been granted, the defendant took out another summons to plead several matters, which summons was objected to

as irregular while the judgment remained in force. The learned judge at chambers, however, granted the order, but it was never drawn up nor served upon the plaintiff.

Mansel having obtained a rule nisi to set aside this order, both rules came on for argument together.

Tyrwhitt in support of the first rule, and in shewing cause against the second rule granted to *Mansel*. It appears from *Tidd*, 9th ed. 567, that formerly, if instructions had been given to the clerk of the rules for a rule to plead several matters, the plaintiff could no more sign judgment than if the rule itself had been obtained. It is submitted that, since the new practice, a summons before a judge has the same effect which instructions to the clerk of the rules formerly had. With regard to the rule for setting aside the judge's order, it is perfectly unnecessary; for the order having never been drawn up and served upon the plaintiff, so that he was not bound or prejudiced by it in any way, he need not have noticed it, for it might have been abandoned by the defendant at any time: *Sedgwick* v. *Allerton* (*a*), *Joddrell* v. —— (*b*), *M'Dougall* v. *Nicholls* (*c*). The defendant obtained it merely to have it in readiness, in case the judgment should be set aside; for, unless he had done so, judgment might have been signed against him a second time before he could get an order to plead several matters. If a judge's order is set aside, it must be without costs; per *Parke*, B., in *Hargrave* v. *Holden* (*d*).

Mansel, in support of his rule. The defendant was quite irregular in getting an order to plead when the cause had arrived at final judgment, and was therefore at an end. (He was then stopped.)

Per Curiam.—With regard to the first rule, the practice, as laid down by Mr. *Tidd*, does not now apply, for it is discretionary with the judge to grant the rule to plead several matters, but both rules may be made absolute without costs.

Rule absolute for setting aside the judgment, without costs.
Rule absolute for setting aside the order, without costs.

(*a*) 7 East, 542.
(*b*) 4 Taunt. 253.
(*c*) 3 Ad. & El. 813.
(*d*) 3 Dowl. P. C. 176.

DOE, on the several demises of ANN LEEMING and MARY LEEMING, *v.* ANN SKIRROW.

June 5.

On the execution of a conveyance in fee by lease and release, it was verbally agreed that the vendor should occupy the property until the death of either himself or the purchaser. On the death of the purchaser notice to quit was given to the vendor. The vendor also died shortly after the expiration of the notice, but his widow continued in possession. On ejectment brought against her it was held, that she could not set up a mortgage executed by her husband previously to the conveyance, although the purchaser was cognisant of this mortgage at the time of the sale, because her possession was derived from the purchaser, under whom the plaintiffs claimed.

EJECTMENT for lands in Lancashire. At the trial before *Parke*, B. at the Lancaster Spring assizes, 1836, the following facts were adduced in evidence. In February 1827, *John Skirrow*, and the defendant his wife, by lease and release, conveyed the lands in question to *J. B. Leeming*, under whose will the lessors of the plaintiff claimed. The release contained a covenant by *J. Skirrow* to levy a fine to bar the dower of his wife; she at first ob-

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jected, on that account, to join in the execution of the deed, and it was then verbally arranged that her husband should occupy the land during the joint lives of himself and *Leeming*. *Leeming* died in 1833, whereupon *Ann Leeming*, one of the lessors of the plaintiff, gave *Skirrow* notice to quit. *Skirrow* himself, who had never paid rent or interest on the purchase money during his life, died shortly after the expiration of this notice to quit, and his widow refusing to give up possession, this action was brought. The defendant relied upon an unsatisfied mortgage made by her husband to a Mr. *Marshall*, prior to the sale to *Leeming*, and there was evidence to show that *Leeming* was cognisant of this mortgage at the time of the sale. It was contended that this defence was not open to the defendant, as she was thereby disputing the title of *Leeming*, from whom she obtained possession. The learned baron directed a verdict for the plaintiff, reserving leave to the defendant to move to enter a nonsuit.

R. Alexander having obtained a rule nisi,

Cresswell shewed cause. The authority of *Cornish* v. *Searell* (*a*) was pressed for the defendant at the trial. In that case, the defendant, who had possession under a lease, on a sequestration issuing against his lessor, attorned to the sequestrators. They afterwards brought ejectment against him; the defendant set up the lease, and it was held that he might dispute their title in that manner, because he had not been let into possession by them, or any one claiming under them; nor indeed had they any power to turn him out of possession. Now here the defendant received possession from her husband, and he from *Leeming*, who is represented by the lessors of the plaintiff. *Cornish* v. *Searell* therefore does not apply, and it follows that if she can set up the mortgage, that her husband also might have done so, notwithstanding the estoppel in his own release. The defendant must be considered to have continued the possession of her husband, and cannot contend that her entry was wrongful and a disseisin; *Doe* v. *Perkins* (*b*).

Addison, contrà. The defendant was not estopped, nor would her husband have been estopped, for he was in possession before the release, and cannot be said therefore to have got possession from *Leeming*. Thus *Cornish* v. *Searell* is an obvious authority. It is not disputed that the legal estate is in the mortgagee, and it is clear that *Leeming* had notice of the mortgage. The defendant's husband was not estopped from setting up the mortgage; and even if he was, his wife is not, for, as her execution of the release was nugatory, she is a mere stranger, and how is she then estopped? *Doe* v. *Perkins* has been doubted recently.

Lord DENMAN, C. J.—We acted upon it very recently (*c*). The defendant was in possession by the sufferance of the lessors of the plaintiff, for they had power to turn her husband out on *Leeming*'s death, and the defendant came in under her husband.

LITTLEDALE, J., PATTESON, J., and WILLIAMS, J. concurred.

Rule discharged.

(*a*) 8 B. & C. 471. (*b*) 3 M. & S. 271. (*c*) *Doe* v. *Gregory*, 2 A. & E. 14.

BEVERLEY *v.* The LINCOLN Gas and Coke Company.

May 25.

1. Assumpsit may be maintained against a corporation whether with or without a head, on an executed parol contract in respect of matters of ordinary necessity and inconsiderable value. Therefore a gas and coke company, being a corporation without a head, was held liable in assumpsit for six gas meters sold to them for 15*l.*

2. Where assumpsit may be maintained at all against such a corporation, and goods sold conditionally on sale or return, are not returned within a reasonable time, it is not necessary to declare specially, but the corporation is liable in common indebitatus assumpsit, in the same manner as any individual would be under the same circumstances.

ASSUMPSIT for goods sold and delivered. Plea: non assumpsit. At the trial before the Assessor for the Sheriff of Yorkshire, in the West Riding of that county, it appeared that the defendants had been incorporated, and that the plaintiff, who was a manufacturer of gas-meters, had supplied the Company with six meters, for the price of which, 15*l.*, the action was brought. It appeared also, that the meters had been sold with an undertaking that they should be taken back if found not to answer the purposes of the Company. Two of them had been seen in use, but they were afterwards all returned, on the ground that they did not suit the Company. The plaintiff refused to take them back. For the defendants, it was objected that the declaration should have been on the special contract; and secondly, that assumpsit was not maintainable at all against a corporation. The assessor left it to the jury to say whether the goods had been returned within a reasonable time. The jury found they had not been so returned. A verdict was then found for the plaintiff, but leave was given to the defendants to move to enter a nonsuit.

Peacock, in Hilary term, 1837, having obtained a rule nisi,

R. Alexander, on January 28th in the same term, shewed cause (*a*).—*Bailey* v. *Goldsmith* (*b*), *Bianchi* v. *Nash* (*c*), and many other cases, shew, that where goods are sold upon sale or return, indebitatus assumpsit may be brought for them, if not returned within a reasonable time. With regard to the second objection, that a corporation cannot be charged in assumpsit, although it is generally true that a corporation can do no act except under its common seal, yet upon this rule an exception has been grafted, enabling it to contract without seal for ordinary purposes and matters of daily necessity. The cases are collected in *Bacon's Abr.* tit. Corporation (E 3), *Comyn's Digest*, tit. Franchises (F 13), and *Viner's Abr.* tit. Corporations (G 2). The principal authorities on this point are, *Dean of Rochester* v. *Pierce* (*d*), *Mayor of Stafford* v. *Till* (*e*), *Mayor of Carmarthen* v. *Lewis* (*f*), *City of London Gas Company* v. *Nicholls* (*g*), *Smith* v. *Birmingham Gas Company* (*h*). *The East London Waterworks Company* v. *Bailey and others* (*i*), was decided against the plaintiffs, on the ground that their contract for certain pipes to be delivered by the defendants was an executory contract; but *Best*, C. J., in his judgment, expressly notices that their contracts are valid without seal, where they are executed or relate to acts of daily necessity, or acts of an insignificant nature. The contract in this case exactly falls within the class of exceptions noticed by him. The price of the meters was only 15*l.*; suppose the action had been brought for the price of one meter only, would the case have been varied, or will it be said that it would not have been too insignificant to require the affixing of the corporation seal? *Broughton* v. *The Manchester*

(*a*) Before *Patteson*, J. *Williams*, J. and *Coleridge*, J.
(*b*) Peake, N. P. C. 56.
(*c*) 1 M. & W. 545.
(*d*) 1 Campb. 466.
(*e*) 4 Bing. 75.
(*f*) 6 C. & P. 608.
(*g*) 2 C. & P. 365.
(*h*) 1 Ad. & E. 526.
(*i*) 4 Bing. 283.

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and Salford Waterworks Company (*a*), in which it was held that the defendants were not liable on a bill of exchange accepted by them, payable six months after date, is no authority against the present plaintiffs, because that case was decided on the ground that it was within the several acts passed for the protection of the Bank of England.

Peacock, contrà.—After the decisions of *Bailey* v. *Goldsmith* (*b*), and *Bianchi* v. *Nash* (*c*), it must be admitted that, under similar circumstances, indebitatus assumpsit might lie against an individual, but it will not lie against a corporation. The two objections therefore resolve themselves into one. The second objection, however, is valid. There is a distinction between aggregate corporations with, and those without a head. In *Bacon's Abr.* tit. Corporation (E 3), it is said, "aggregate corporations, consisting of a constant succession of various persons, can regularly do no act without writing; therefore gifts by and to them must be by deed." In this case the corporation is without a head. A corporation with a head may do some trifling acts without seal—appoint a servant, for instance. There are very few cases in which a corporation can be made liable on their parol contracts, and if this be one of them, it by no means follows that they be made liable in assumpsit, because, as a corporation is impersonal, and therefore incapable of making an express promise(*d*), the law will not raise against them an implied promise. In all the cases of assumpsit, in which parol contracts with corporations were upheld, they were the plaintiffs; for a corporation may receive a promise, although it cannot give one. Debt may in some cases be brought against a corporation, as in *Tilson* v. *The Warwick Gas Company* (*e*), and if the present defendants are liable at all, it can only be in debt. In *Murray* v. *The East India Company* (*f*), and *Slark* v. *The Highgate Archway Company* (*g*), the actions were undoubtedly in assumpsit upon bills of exchange, but those companies were authorised by acts of parliament to give such instruments, so that the legislature itself had conferred on them the capacity to make a promise.

Cur. adv. vult.

PATTESON, J., in the course of this term, delivered the judgment of the Court, and after stating the facts, thus proceeded:—In this case two objections were insisted on: first, that the action was misconceived in form, for that the contract was executory only; secondly, that at all events, assumpsit could not be maintained against the defendants, being a corporation aggregate without a head.

As to the first, the jury found at the trial that the time of return was unreasonable. Upon the argument in support of this ground of nonsuit, it was not denied that if the action had been between two individuals upon this finding of the jury, the form of action would have been sustainable. For this the cases of *Bailey* v. *Goldsmith* (*b*), and *Bianchi* v. *Nash* (*c*), are certainly sufficient authorities. But it was said that those decisions were inapplicable to the case of a corporation, because that could not, at all events, enter into a parol contract for the delivery of goods on sale or return. It

(*a*) 3 B. & A. 1.
(*b*) Peake, N. P. C. 56.
(*c*) 1 M. & W. 545.
(*d*) *Frevill* v. *Ewebancke*, 1 Rol. Rep. 82, pl. 28.
(*e*) 4 B. & C. 962.
(*f*) 5 B. & A. 204.
(*g*) 5 Taunt. 792.

seems to us that this distinction cannot be maintained, even if the facts were sufficient to raise it; for the principle on which the cases cited above, and others, have been decided, as to the proper form of declaring where the original contract has been executory, but the period of credit has expired or condition has been performed, is not that the law alters the mode of declaring on the original contract, and states it not according to the fact, but that it conclusively infers that simple contract to pay the price for goods sold and delivered, which would arise upon the facts of a sale and delivery, without any special circumstances accompanying them. He who seeks to disturb that inference, must not content himself with merely shewing conditions, or other special provisions, forming part of the contract at the time of its being entered into; he must shew them in existence and operation at the time of action brought: if not, they may be struck out of consideration, and the contract treated as originally simple, unconditional, and executed. Now this reasoning will apply equally to a corporation and an individual; and we must now take it that the goods were sold unconditionally, have been delivered, and are in the possession and use of the corporation.

This therefore brings us to the second question, which is, whether an action of assumpsit can be maintained against a corporation aggregate without a head, on an executed parol contract. It is well known that the ancient rule of the common law, that a corporation aggregate could speak and act only by its common seal, has been almost entirely superseded in practice by the Courts of the United States in America (*a*). The decisions of those Courts, although intrinsically entitled to the highest respect, cannot be cited as direct authority for our proceedings; and there are obvious circumstances which justify their advancing with a somewhat freer step to the discussion of ancient rules of our common law, than would be proper for ourselves. It should be stated, however, that in coming to the decision alluded to, those Courts have considered themselves not as altering the law, but as justified by the progress of previous decisions in this country, and in America. We, on our part, disclaim entirely the right or the wish to innovate on the law, upon any ground of inconvenience, however strongly made out; but when we have to deal with a rule established in a state of society very different from the present, at a time when corporations were comparatively few in number, and upon which it was very early found necessary to engraft many exceptions, we think we are justified in treating it with some degree of strictness, and are called upon not to recede from the principle of any relaxation in it, which we find to have been established by previous decisions. If that principle, in fair reasoning, leads to a relaxation of the rule, for which no prior decision can be found expressly in point, the mere circumstance of novelty ought not to deter us; for it is the principle of every case which is to be regarded, and a sound decision is authority for all the legitimate consequences which it involves.

Several cases have determined that corporations aggregate may maintain actions on executed parol contracts. In *The Dean and Chapter of Rochester* v. *Pierce* (*b*), Lord *Ellenborough*, first at nisi prius, and in this Court afterwards, held that they might sue in debt for use and occupation of their lands; and the Court of Common Pleas, in *The Mayor and Burgesses of Stafford* v. *Till* (*c*), held the same as to assumpsit. This establishes that where a benefit has been enjoyed, such as the occupation of their lands by

(*a*) 2 Kent's Comm. p. 288. (*b*) 1 Camp. 466. (*c*) 4 Bing. 75.

their permission, the law will imply a promise to make them compensation, which promise they are capable of accepting, and upon which they may maintain an action. The action for use and occupation is established by the 11 *Geo.* 2, c. 19, s. 14, and, according to the words of the statute, may be maintained "wherever the agreement is not by deed." Some agreement seems to be implied as the foundation, though it is well established that it need not amount to a formal demise, or even be express. To hold then that a corporation is within this statute, is to hold that it may be a party to an agreement not under seal, at least for the purpose of suing on it, and it would be rather strong to deny at the same time that it could be a party to it for the purpose of being sued on it. Lord *Ellenborough* indeed says, in *The Dean and Chapter of Rochester* v. *Pierce* (*a*), that the action for use and occupation does not necessarily suppose any demise; "it is enough that the defendant used and occupied the premises by the permission of the plaintiff, and a corporation, as well as an individual, may grant such permission without deed." But, call it by whatever name we please, permission or demise, it clearly binds the corporation; the party occupying and paying rent under it acquires rights from the corporation, becomes their tenant from year to year, and can be ejected only by the same means as would be available for an individual landlord. Here then the law implies that the corporation has acted as a contracting party, and that too in a contract, to the validity of which, for the purposes of this action, *the absence of any deed is essential.* If in that case an express agreement, not under seal, had been tendered in evidence to prove the terms on which the defendant held, it must have been received, and if on the face of it it had appeared that the plaintiffs had come under any conditions precedent to the recovery of rent on their part, such conditions would surely have been binding on them, though not under seal, and the non-performance of them would have been an answer to the action. In *The Southwark Bridge Company* v. *Sills and others* (*b*), the contract for letting was proved by a series of letters. We agree that the relation between the corporation and the occupier of its land may commence without express contract,—that it may in the first instance appear to want many of the legal incidents of the relation between landlord and tenant; but add the fact of payment of rent for one year, and acceptance by the corporation, and you add express contract on the part of the corporation; it has apparently done no more than acquiesce in the receipt of a certain compensation for the occupation of its land for a year; and yet, by the addition of that fact, the corporation and the occupier are demonstrated to be landlord and tenant. This appears to us to show that in the eye of the law the relation between them commenced in contract, though it wanted at first the evidence from which it might be inferred.

But if this be a contract to which a corporation may be a party, though not under seal, and any rights resulting from that agreement come to be enforced, may not that form of action be applied which is appropriate to parol agreements? Is it not unreasonable to hold, that a corporation may make a binding promise, and yet that assumpsit shall not be maintainable against it, if the promise be broken?

If, then, it be established, that, upon the same contract, the remedies are mutual; that, if the corporation may sue its tenant in assumpsit on a parol demise, the tenant may, in turn, sue it in the same form of action, we do not

(*a*) 1 Camp. 466. (*b*) 2 C. & P. 371.

see how it can be denied that a corporation, occupying land, may be sued in assumpsit generally.

We may suppose two contracts entered into at the same moment in writing not under seal; by the one, a corporation professes to demise its land to *A. B.*, by the other, *A. B.* demises his land to the corporation, and enjoyment of the premises is had under both; it would be surely an unsatisfactory state of the law which should compel us to hold, that if the corporation sued *A. B.* in assumpsit for his rent, *A. B.* might not set off or sue, in the same form, for that which was due from the corporation.

We have been thus minute in examining the case of use and occupation, because it appears to us very fairly to open the principle on which this matter ought to stand. The same point has been ruled in an action for goods sold and delivered. *The City of London Gaslight and Coke Company* v. *Nicholls and another* (*a*) was assumpsit for gas supplied; the objection was taken, that the contract was not under seal; *Best*, C. J., overruled it at once, saying, "it was quite absurd to say, that there was any necessity for a contract by deed in such case." If, in that case, a set-off had been pleaded for meters supplied to the Company, could evidence in support of it have been rejected, because there was no contract under seal for the supply? Yet, if it could not, upon what principle can it be maintained, that that supply might not have been made the ground of an action of indebitatus assumpsit?

We have not overlooked the technical difficulty which has been alleged upon the form of the declaration, in which a mere promise is stated. Part of our argument has already been addressed to meet it; it seems to us that it rests on no solid foundation. When the question is, whether a particular party can sue or be sued by a particular writ or count, or be counted against in any particular form, the true answer is to be found by putting another question, can he enter into the contract, or bring himself or be brought within the special circumstances which form essential parts of the statement in such writ or count? That this is the principle may be seen conclusively in the history of our forms of action, ancient and modern, given in the third volume of *Blackstone's Commentaries*. If, therefore, it be asked, whether a corporation can be sued in assumpsit, we ask in return, can it bind itself by a parol contract, can it make a promise? if it can, the former question must be answered in the affirmative.

We therefore agree with the Court of Common Pleas, in *The Mayor of Stafford* v. *Till* (*b*), that there is no substantial difference in this respect between assumpsit and debt. Every count, indeed, in debt for goods sold and delivered, charges a contract; the words "sold and delivered," says *Buller*, J., in *Emery* v. *Fell* (*c*), "imply a contract, for there cannot be a sale unless two parties agree." *De Grave and another* v. *The Mayor and Corporation of Monmouth* (*d*) was debt against a corporation for the price of weights and measures. It was contended that the action could not be maintained, as a corporation cannot contract, unless by some instrument under the common seal. The delivery had been proved, an examination of the goods at a full meeting of the corporation, and subsequent use of them; the order for them was by the mayor de facto, who was afterwards ousted. Lord *Tenterden* thought the examination was the exercise of an act of ownership, "and that,

(*a*) 2 C. & P. 365.
(*b*) 4 Bing. 75.
(*c*) 2 T. R. 30.
(*d*) 4 C. & P. 111.

by so doing, the corporation had recognised the contract." The verdict passed for the plaintiffs, and was not disturbed. The recognition of a contract is its adoption, the taking it to be the contract of the party so recognising it; but that assumes it to be a contract which the party was capable of entering into. Lord *Tenterden*, therefore, must have considered the corporation as capable of contracting for the purchase of goods without a deed; and in *Dunston* v. *The Imperial Gas Light Company* (*a*), where the plaintiff failed on another ground, he carefully guards himself from being supposed to decide the contrary.

We certainly have not found any decided case, in which it has been held that a corporation may be sued in assumpsit on an executed parol contract,—a circumstance of great but not conclusive weight. For, not to mention that there is no case in which the contrary has been expressly decided upon argument, if it be remembered what the course of the law has been on this subject, we shall find that circumstance not unnatural, and that some deduction must be made from the weight of dicta unfavourable to our present view, which may be found here and there in the books upon this subject. At first the rule appears to have been exclusive, as, indeed, its principle required it to be. A corporation, it was said, being merely a body politic, invisible, subsisting only by supposition of law, could only act or speak by its common seal; the common seal, in the words of *Peere Williams*, in *Rex* v. *Bigg* (*b*), was the hand and mouth of the corporation. The rule, therefore, stood not upon policy but on necessity, and was, of course, equally applicable to small as to great matters, to acts of daily or of rare occurrence, to what regarded personal as well as real property. But this, though true in theory, was intolerable in practice; the very act of affixing the seal, of lifting the hand, or opening the mouth, could only be done by some individual member, in theory quite distinct from the body politic, or by some agent; the management of the corporate property, the daily sustentation of the members, the performance of the very duties for which the corporation was created, required incessantly that acts should be done, sometimes of daily recurrence, sometimes entirely unforeseen, yet admitting of no delay, sometimes of small importance, or relating to property of little value: the same causes also required that contracts to a small amount should often be entered into; in all these cases to require the affixing of the common seal was impossible, and therefore, from time to time, as the exigencies of the case have required, exceptions have been admitted to the rule; and, what we desire to draw attention to is this, that these exceptions are not such as the rule might be supposed to have provided for, but are in truth inconsistent with its principle, and justified only by necessity. As each exception of this kind was made it was not unnatural that the rule, in all other yet unforeseen cases, should receive confirmation, though it would be hardly fair to anticipate thence what the opinion of the judges would have been, if the cases had been presented before them and required their decision.

In the progress, however, of these exceptions it has been decided, that a corporation may sue in assumpsit, on an executed parol contract; it has also been decided, that it may be sued in debt on a similar contract; the question now arises on the liability to be sued in assumpsit. It appears to us, that what has been already decided in principle warrants us in holding that this

(*a*) 3 B. & Ad. 125. (*b*) 3 P. Wms. 423.

action is maintainable. It seems clear that, for a matter of such constant requirement to a gas company as gas meters, and to so small an amount as 15*l.*, the Company, whether with or without a head, might contract without affixing the common seal; see *Bro. Abr.*, Corporation, 56; *Horn* v. *Ivy* (*a*); and it is clear that they might have been sued in debt for goods sold and delivered; for the reasons given, we think they are equally liable in assumpsit, and, consequently, this rule will be discharged.

Rule discharged.

(*a*) 1 Vent. 47.

The KING *v.* The Mayor, Aldermen, and Town Councillors of WINCHESTER.

June 9.

After the aldermen and assessors at a municipal election under 5 & 6 *W.* 4, c. 76, have declared certain persons to be elected councillors, who, on notice of their election, have duly made the declaration required on acceptance of office, the offices are de facto full, and *quo warranto* therefore, and not *mandamus*, is the proper mode of questioning the validity of the election.

SIR *J. CAMPBELL*, A. G., had obtained a rule nisi for a mandamus, calling upon the town council of Winchester to admit two persons of the name of *Earle* and *Dummer* to act and vote as members of the council. At the municipal election in November, 1836, there were two vacancies made in the council of St. John's Ward, by councillors retiring in rotation, and a third vacancy occasioned by the election of one of the members of council as alderman. There were five candidates, Messrs. *Littlehales*, *Benny*, *Wells*, *Earle*, and *Dummer*, the three first of whom were declared by the aldermen and assessors of the ward to be duly elected. Shortly after the election, the assessors of the ward published a declaration, that they had been advised that the burgesses could vote for two candidates only to supply the places of the members of councillors going out by rotation, and not for a third candidate also to supply the extraordinary vacancy made by the election of a third councillor as alderman: that they had therefore examined the voting papers under section 35 of the Municipal Corporation Act (5 & 6 *Will.* 4, c. 76,) and that after striking out all the burgesses who had voted for more than two candidates, they found *Earle* and *Dummer* to have the majority, whom they declared duly elected. The rule had been granted on an affidavit disclosing these facts, and also the fact that *Earle* and *Dummer* had made the declaration required by sect. 50, and accepted office. Affidavits on the other side stated that *Littlehales*, *Benny*, and *Wells* had been declared duly elected, and had made the declaration and accepted office before *Earle* and *Dummer* were declared by the assessors to be duly elected. It appeared also that *Littlehales*, *Benny*, and *Wells* had since acted and voted as councillors.

Sir *W. W. Follett* and *Crowder* now shewed cause.—If there were any reason to question the validity of the first election, it should be done by quo warranto, for the offices are already filled by persons bonâ fide elected; the rule for the mandamus, therefore, must be discharged.

Sir *J. Campbell*, A. G., contrà.—No doubt under the law, which formerly regulated the election of municipal officers, *Rex* v. *Beedle* (*b*), and *Rex* v. *The Mayor of Colchester* (*c*), would be decisive authorities to warrant the discharge of this rule, on the ground suggested. But the ceremony of admitting parties no longer exists; instead of admission is substituted, by s. 50

(*b*) 3 Ad. & El. 467. (*c*) 2 T. R. 269.

King's Bench.

The KING v. The Mayor, &c. of WINCHESTER.

of the act, a mere declaration by the parties themselves that they accept the office, will discharge it faithfully, and that they possess the qualification required. Under s. 35, the candidates having the greatest number of votes are to be deemed to be elected, and to complete their election, nothing is wanting but the declaration, which has also been made by the applicants for this rule; and they apply, not to be admitted to the office, but to be allowed to act as officers.

Lord DENMAN, C. J.—The three persons, the validity of whose election is now to be brought in question, have been declared duly elected, have made the declaration required on their acceptance of office, and have even acted in the discharge of the duties of their office. If all this is not enough to complete the election proceedings, and to fill the office, the office never can be full. Were we to hold otherwise, the distinction between a mandamus and quo warranto would become so difficult to ascertain as to subject parties to the necessity of applying for two rules, one for mandamus, and another for quo warranto, in the event of the former being discharged.

LITTLEDALE, J.—These three persons have been declared by competent authority to be elected, have received notice of their election, and have made the declaration which the 51st section requires of them within five days after such notice. This declaration is substituted for the ceremony of admission at a corporate meeting, which corporate officers formerly went through, and must be considered to have the same effect in completing the proceedings and making the offices full.

PATTESON, J. concurred.

WILLIAMS, J.—We should have continual difficulty in drawing the line between quo warranto and mandamus, if we were not to hold that the offices in this case are full, and that a mandamus must therefore be refused. The 35th section is conclusive in its language; it enacts, that such candidates as shall after examination of the voting papers have the greatest number of votes, shall "be deemed to be elected."

Rule discharged.

A separate rule nisi for a quo warranto in this case had been granted, and was made absolute after the discharge of the above rule; but the Court intimated that two such rules would not be granted in future, as it was equivalent to granting a single rule in the alternative.

The KING *v.* The Trustees of the MILDENHALL Savings' Bank.

June 12.

The clerk of a savings' bank established under 57 G. 3, having embezzled the money of the depositors, the Court *held*, that the remedy of the depositors against the trustees was not by action, and therefore granted a mandamus to compel the trustees to appoint an arbitrator under 9 G. 4, c. 92, s. 45.

IN 1818, a savings' bank was established at Mildenhall, in Suffolk, under 57 *Geo.* 3, c. 130, whereof Sir *Thomas Bunbury*, bart., and others, were duly appointed trustees.

In 1825, the clerk of the bank embezzled a large amount of the deposits.

In 1832, *Crisp*, one of the depositors, commenced an action in the Common Pleas, for money had and received, against the trustees, for his deposits, part of the money so embezzled. That Court determined (*a*) that such action could not be maintained, and that the remedy of the depositors was by arbitration.

In 1835, upon affidavits by *Bret*, another depositor, and executor of his father, also a depositor, stating that a demand had been made by him of the amount which he claimed, and that he had appointed an arbitrator on his own behalf, a rule nisi was obtained for a mandamus, commanding the trustees to appoint an arbitrator on their behalf.

Biggs Andrews (in Hilary term, 1836) shewed cause.—The present application is made under s. 45 of 9 *Geo.* 4, c. 92 (*b*), but that section does not authorise it. The disputes there contemplated are such as may arise between some individual depositor and the whole body of the institution, or some person acting under them. That is not the case here. This dispute arises between a depositor and the trustees, individually, and not acting as the institution at large. That this distinction was contemplated by the legislature is obvious from other clauses; and it provides that the money *of the institution* shall be vested *in the trustees* for the benefit *of the institution*. Sections 2 and 10 also point out the same distinction. The trustees also are in existence before the institution at large is created. It is obvious that the legislature did not intend to withdraw cases of magnitude like the present from the regular tribunals of the country, and such was the opinion of a very eminent counsel now on the bench (*c*). Section 45 is only applicable to cases of minor importance, and when such occur, the trustees are by it authorised to appoint an arbitrator on behalf, not of themselves individually, but of the institution at large.

In *Crisp* v. *Bunbury* (*d*) all that was necessary for the Court to decide was, that an action was not maintainable; any opinion, therefore, as to what might be the proper course must be considered as extra-judicial, and the grounds of it could not have been discussed.

Storks, Serjt. and *Moody*, contrà.—The language of s. 45 shews that it was intended to apply to disputes arising between the depositors, either individually or as a body existing distinct from the institution; and *Rex* v. *The Trustees and Managers of the Witham Savings' Bank* (*e*), *Rex* v. *The Trustees and Managers of the Cheadle Savings' Bank*, prove that the Court put the same construction upon that language.

In *Ex parte Jones* (*f*), the trustees were allowed to prove against the estate of an actuary for money embezzled by him. Besides, it does not necessarily appear that in this case the trustees will be individually liable. There may be sufficient money left to pay the party now claiming. But, even if it should be otherwise, the arbitrators may then state the fact in their award, and the question may again be brought forward and determined by the Court.

(*a*) *Crisp* v. *Bunbury*, 8 Bing. 394.

(*b*) Which provides, that if any dispute shall arise between such institution or any person acting under them, and any individual depositor therein, or any executor, &c., the matter in dispute shall be referred to the arbitration of two persons.

(*c*) Parke, B.

(*d*) 8 Bing. 394.

(*e*) 1 Ad. & El. 321.

(*f*) 2 Mont. & Ayr. B. C. 193.

King's Bench.

The KING v. Trustees of the MILDENHALL Savings' Bank.

In *Crisp* v. *Bunbury*, where this same point arose, the Court, after time taken for consideration, expressed their opinion that the legislature intended the present case to be submitted to the arbitrators.

Cur. adv. vult.

Lord DENMAN, C. J., now delivered the judgment of the Court. This case was argued several terms ago, under very peculiar circumstances, which have led to much doubt and delay. It was a rule for a mandamus to the trustees of a savings' bank, to appoint an arbitrator for the purpose of deciding a claim preferred against them by a depositor, who had sustained a loss by the default of one of the officers. A depositor in the same bank had brought an action against the same trustees for the consequences of the same default, which was tried some time ago in the Common Pleas, where, however, after argument and time taken for consideration, that Court directed a non-suit to be entered, on the ground that no action would lie, but that the remedy must be sought under the arbitration clause (*a*). The reasoning of the Court to this effect is strong, and we cannot say that they were mistaken, though a high legal authority then at the bar had given an opinion that the party ought to proceed by action. This circumstance has induced us to pause upon the case; but we cannot see any ground for reversing the judgment of the Common Pleas on this point, which is, moreover, one of great practical importance to the whole body of depositors in savings' banks throughout the country, little able as they may be supposed to be to bear the expense of legal proceedings, and invited by the act to invest their property where it would be placed under a domestic jurisdiction.

Some doubts also occurred to us whether, under the 9th section of the 57th *Geo.* 3, the trustees could be personally liable to the depositors, and if not, whether we ought to order them to refer to arbitration a question which it would be illegal to decide against them. But we think that this consideration ought not to prevent our placing the claimant in the position which the act has provided for him. There may be particular facts in this case which might prevent that clause from attaching, and the result may be that the bank may be made liable, not the trustees personally. The rule must be absolute.

Rule absolute.

(*a*) *Crisp* v. *Bunbury*, 8 Bing. 394.

WARRE and another, Executors of THOMAS WARRE, *v* CALVERT.

June 5.

Debt on bond by defeudant, as surety for the performance by *S.* of certain works, according to contract with the plaintiffs, within a time specified, and for a specified sum. Breach, that *S.* did not complete the works in time, and that plaintiffs were compelled to employ another person at great additional expense. Plea, non est factum. By the terms of the contract, *S.* was to be paid every two months for three-fourths of the value of the work done, and for the remaining fourth when the whole work was completed. At the time specified *S.* was a bankrupt, the work was not completed, and the plaintiffs had already advanced him sums of money beyond the entire value of his work. Another person was then employed to complete the work, and the aggregate amount of what was paid to him and to *S.* greatly exceeded the contract price, but came within it, if the sums advanced to *S.* over and above the value of his work were deducted.—*Held*, that though the defendant was liable on his bond, because *S.* had not performed the work by the time stipulated, nominal damages only could be recovered, as the plaintiff's loss arose in consequence of advances made to *S.* not according to the contract, and that this defence might be set up in mitigation of damages, under the plea of non est factum.

DEBT on a joint and several bond for 5000*l.*, given by one *Laycock*, deceased, and another, to *Thomas Warre*, treasurer of the London Dock

Company. Plea: non est factum. The replication suggested that the bond was given to secure the due performance for the Company of certain works by one *Streather*; that *Streather* was to have completed the works by a certain time, which was afterwards enlarged by consent of *Laycock*; that *Streather* commenced the works, but did not complete them within the enlarged time; that the Company had paid him 48,155*l.*, and that, in consequence of his default, they were obliged to get another person to complete them at a further additional expense of 20,562*l.*

At the trial before Lord *Denman*, C. J., at the London Sittings after Hilary term, 1836, it appeared that the bond in question had been given by *Laycock* and another as a security for the performance by *Streather* of a contract bearing date the 29th September, 1829, and made by *Streather* of the one part, and *James Warre*, on behalf of the London Dock Company, of the other part; whereby *Streather* agreed to execute certain works required by the Company in the formation of an entrance from the Thames at Shadwell to the Eastern London Dock, to be completed within twelve months from the time of commencement, in consideration of the sum of 52,200*l.*, and of the old materials on the premises. The engineer of the Company was to employ competent persons to perform the work, in case *Streather* should fail to do so, in which case the cost thereof should be deducted from the sum to become due to *Streather* under the contract. The directors were to be at liberty to alter their plans, in which case a proportionate addition or deduction should be made to, or from, the sum to be paid to *Streather*. The said *Warre* agreed to pay *Streather* the said sum of 52,200*l.* by the following instalments, upon the production in each case of a certificate signed by the engineer: viz. three-fourths of the cost of the work certified to have been done every two months; the first instalment to be paid whenever the engineer should certify that one-eighth part of the whole work had been performed, and the remaining one-fourth after the full completion of the contract. The works were commenced on the 28th December, 1829, and should therefore have been completed on the 28th December, 1830. *Streather* having afterwards applied, with the consent of his sureties, for an extension of the time, the directors agreed to allow him an additional term of three months, until the 28th of March, 1831. Soon after the commencement of the works, and before any instalment had become due, according to the stipulations of the contract, the Company, on the application of *Streather*, advanced him money, which they also did afterwards, on several occasions. On the 28th of March, 1831, the amount of advances made by the Company amounted to 49,619*l.* At that time *Streather* was in embarrassed circumstances, and the works being still incomplete, the Company gave him and his sureties notice that he could not be permitted to proceed. The value of the work done by *Streather* up to this time was 36,429*l.*, of which 4140*l.* was for extra work and deviations from the original plan. The Company afterwards employed another person to finish the works at an expense of 18,875*l.* The whole amount, therefore, paid by the Company to *Streather*, and for finishing the works, was 68,494*l.*; from this was to be deducted a sum of 8589*l.*, put to the credit of *Streather* for the extra work and for materials supplied by him and left on the premises. Thus the sum of 7705*l.* had been expended by the Company in the execution of the works, over and above the contract price, 52,200*l.* It was contended on behalf of the plaintiff, that as *Laycock* was surety for *Streather*,

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the defendant's liability was co-extensive with that of *Streather*; on behalf of the defendant, that the plaintiffs had gone beyond the agreement in the advances made to *Streather*, that as the value of the work done by him was about 36,000*l.*, they should not have advanced him more than about 27,000*l.*, and that deducting the costs of the extra work, and the amount of the advances made to *Streather* beyond the value of the work performed by him, the Company had in reality paid less on account of the work than the contract price; and *Law* v. *The East India Company* (*a*) was cited, and the former proceedings arising out of this transaction, *Crowfoot* v. *The London Dock Company* (*b*). His lordship was of opinion that the defendant was liable in nominal damages only, for the breach of contract by *Streather*, who had failed to complete the works within the stipulated period, since the substantial loss incurred by the Company was occasioned by advances to *Streather* not warranted by their contract with him. The jury, by direction of his lordship, found a verdict for the plaintiff, damages one shilling. Leave was given to move to increase the damages, and it was afterwards arranged that the point should come on in the form of a special case.

Sir *F. Pollock*, for the plaintiffs.—It is said that the plaintiffs have no right to recover from the defendant for any substantial loss occasioned by *Streather's* default, because they might have protected themselves by retaining in their own hands all beyond three-fourths of the value of the work done by him. But the arrangement to retain part of the money was for the protection of the plaintiffs only; it is sufficient to say that *Streather* did not perform his contract, and that in consequence the plaintiffs have lost more than the amount of the bond. Suppose the defendant had pleaded non damnificatus, could he have shewn that the Company had not been damaged, because they paid *Streather* in advance? If not, he certainly cannot do so under the present plea of non est factum. What a Court of Equity might do under the circumstances is immaterial. If the Company had always retained the price of one-fourth the work done, what need of securities? It was to indemnify themselves for advances that they took securities. The case of *Law* v. *The East India Company* was relied upon by the defendant at the trial. There it was held, that if the obligee pays the principal, the surety is discharged. But in that case it appeared that the principal had discharged his duty; and secondly, this Court cannot be guided by a Court of Equity, where the rights of parties are construed upon principles not available at law. But even if the conduct of the plaintiffs affords any defence, it should have been pleaded specially.

Sir *J. Campbell*, A. G., contrà.—It was not objected at the trial that the answer to the plaintiff's claim should have been specially pleaded; it cannot therefore be objected now; and indeed it could not have been pleaded, for it is not denied that the bond has been forfeited, and the only question which remains is as to the amount of damages. Now with respect to this question, the defendant has to complain, not only that the plaintiffs did not, as agreed, retain part of the price for work done, but that they even advanced *Streather* more than 12,000*l.* over and above the price of the entire work. If the Company had retained the fourth part of the price of the work done by

(*a*) 4 Ves. 824. (*b*) 2 C. & M. 637.

Streather, viz. about 9000*l.*, and had refused to advance him any money, they would have had about 20,000*l.* with which to complete their works. *Law* v. *The East India Company* (*a*), if authority is needed, establishes the defendant's position. In that case the Company were held to have discharged the sureties by payment to the principal. If the Company had advanced the whole 52,200*l.* to *Streather* before he had done a particle of the work, and *Streather* had absconded with the money, without ever doing a particle of the work, would the defendant be liable as *Streather's* surety? Undoubtedly not; and yet the case supposed is identical in principle with the present case, and differs from it in degree only.

Sir *F. Pollock*, in reply.—In the case supposed, the defendant would be liable for the whole amount, if it did not exceed the amount of the bond; for under no circumstances could the bond be of any effect, or the surety incur any liability, if the Company had retained a fourth of the value of the work, certified by the Company's engineer to have been completed to his satisfaction. The bond therefore was mere waste of parchment, unless intended to secure advances.

Lord DENMAN, C. J.—After full discussion, I retain the opinion which I expressed at the trial, that the Company's loss has not arisen from any breach of the contract, for the due performance of which the defendant was surety, but from the advances which they of their own free will, and independently of the contract, chose to make to *Streather*.

LITTLEDALE, J.—It is clear that the advances made to *Streather* were not made under the contract or within the terms of it. The defendant, as surety, had a right to expect from the obligees a strict compliance with the contract, and if they have sustained loss by a departure from it, he is not liable. No vigilance on his part could have protected him, for he had no means of ascertaining the money transactions of the Company with *Streather*. I decide this case on the ground that these advances were not made under the contract.

PATTESON, J.—It is unnecessary to consider whether any action could be maintained on the bond, after the time specified in it has been extended by agreement, because the defendant has only pleaded non est factum, and it is clear there has been a breach of the condition. It is said the plaintiffs were evidently not bound to retain for part of the work completed, because, if they were so bound, they would have been so secure that the bond would have been nugatory. But I think, even if they had retained, the bond might be useful in this way; *Streather* might have been unable to complete the work, and if they had been obliged to get somebody else to complete it, the contract price might be so much exceeded, as to make it expedient to come upon the sureties to pay the excess. The advances made to *Streather* might be on account of the contract, but they certainly were not according to the contract.

WILLIAMS, J. concurred.

(*a*) 4 Ves. 824.

King's Bench.

June 6.

Trespass for assault and false imprisonment against the sheriff of K. Plea, that the plaintiff was arrested and detained in custody under a writ of attachment for a contempt issuing out of Chancery.

Replication, that the contempt was for not answering a bill; that the plaintiff was in custody under such process for thirty days; that the contempt was not cleared, and that the plaintiff was not brought to the bar of the Court of Chancery, whereby it became the duty of the defendant to discharge the plaintiff:—*Held*, that the defendant under these circumstances was not liable in trespass; and *semble*, that in order to make him liable under 11 *Geo.* 4 & 1 *W.* 4, c. 36, s. 15, r. 5, to an action on the case, it must be averred, that he had notice of the contempt for which the party was attached, and that the thirty days had expired.

SMITH *v.* EGGINGTON.

TRESPASS for an assault, and false imprisonment of the plaintiff for the space of two months, in the gaol of Kingston-upon-Hull.

Pleas: 1st. not guilty.

2nd. As to the assault and imprisonment and detaining the plaintiff part of the time mentioned, that before &c., a writ of attachment issued out of the Court of Chancery, directed to the defendant as sheriff of the county of Kingston-upon-Hull, commanding him to attach the plaintiff and one *J. D.*, so as to have them in the Court of Chancery on the 8th January then next, to answer, as well touching a contempt which it was alleged they had committed, as also such other matters as should be laid to their charge, and further to perform and abide by such order, &c. Averment, that the writ was delivered to the defendant, that he was then sheriff &c., to be executed &c., and that defendant by virtue thereof arrested &c. on the 18th December, 1834; and that the defendant, not having received any writ of habeas corpus, or other writ, order, or direction to bring the plaintiff to the bar of the Court of Chancery, or to discharge her, detained her in prison by virtue of the writ until 31st March, 1835, when she was discharged by an order of the Vice-Chancellor as to the contempt; and thereupon the defendant forthwith discharged the plaintiff out of his custody, which was the trespass &c.

Replication.—That though the defendant did arrest the plaintiff by virtue of the said writ, yet that the writ issued against the plaintiff for contempt in not answering a bill filed against the plaintiff and others, by *J. D.* and *R. D.*, and that the plaintiff under such process was in actual custody of the defendant for thirty days, to wit, from &c., and was not during that time brought to the bar of the Court of Chancery to answer her contempt, nor was her contempt ever cleared; and that the last of the thirty days happened in term, to wit &c.; and that the said *J. D.* and *R. D.* did not bring the plaintiff by habeas corpus to the bar of the said Court within thirty days of the time of her being actually in custody. By reason whereof it became the duty of the defendant to have discharged the plaintiff; and though the plaintiff after the expiration of the thirty days, to wit &c., requested the defendant to discharge her, yet the defendant, not regarding the statute &c., refused to do so, but wrongfully imprisoned and detained her modo et formâ. Verification.

Special demurrer, assigning for cause that the defendant was not liable to be sued in this action under 11 *Geo.* 4 & 1 *Will.* 4, c. 36, s. 15, rule 5, for detaining the plaintiff in custody under the attachment, and that the replication is bad for the cause assigned. Joinder.

R. V. Richards, in support of the demurrer.

Firstly, nothing appears in the replication to shew that the sheriff has acted improperly. Secondly, if he has, trespass is not the proper remedy. The first point turns upon the construction of 11 *Geo.* 4 & 1 *Will.* 4, c. 36, s. 15, rule 5 (*a*). Construing this most unfavourably for the defendant, that

(*a*) Which provides, "That if the defendant under process of contempt for not appearing, or not answering, be in actual custody, and shall not have been sooner brought to the bar of the Court under process to answer his contempt, the plaintiff, if the contempt be not sooner cleared, shall bring the defendant by a habeas corpus to the bar of the Court within thirty days from the time of his being actually in custody or detained (being already

it was his duty under the actual circumstances, without an order of the Court, to have discharged the plaintiff at the end of the thirty days, still there is nothing in the declaration to shew that he was acquainted with them. The plaintiff, from all that appears, might, for any thing the sheriff knew to the contrary, have been committed for a contempt other than either of those two mentioned in the rule. The nature of the contempt does not appear on the face of the attachment, and if the defendant had been committed for a contempt not provided for by the rule, the sheriff would not have been justified in discharging her. The sheriff also is not bound, even supposing him informed as to the nature of the contempt, to take notice that the thirty days have expired; but it cannot be presumed that he was informed. All these particulars are within the knowledge of the party committed, the sheriff has no means of informing himself respecting them. They ought, therefore, to have been notified to him by the party, and such notification should have been averred on the record.

Secondly. At all events, even if the detention was improper, still the sheriff is not liable in trespass. The imprisonment of the defendant was lawful in its commencement, the detention for thirty days was lawful, and there is nothing in any subsequent act to shew that the sheriff has abused an authority given him by the law. He is, therefore, not liable in trespass; *The Six Carpenters' Case* (*a*). All that is complained of is, that the sheriff did not discharge the defendant so soon as she was entitled to be discharged. That is a mere non-feasance, and trespass does not lie; *Gates* v. *Bayley* (*b*). The proper remedy is by action on the case, as where the sheriff refuses to take a bail-bond, or under an execution neglects to leave enough to defray the landlord's rent. Case was the form of action brought in *Crozer* v. *Pilling* (*c*), for not directing the sheriff to discharge the plaintiff on payment of debt and costs. In *Winterbourne* v. *Morgan* (*d*), it is true that the sheriff was held liable in trespass after a lawful entry, but the Court came to that decision upon the express grounds that there was an actual taking of goods, and other acts done after the legal period had elapsed, and intimated that they might have come to a different conclusion if there had been merely a remaining in possession.

Hurlstone, contrà.—The conduct of the sheriff in this case is more than a mere non-feasance, it amounts to a misfeasance. He is, therefore, liable in this action. The terms of the rule are absolute, that the party shall be discharged at the end of the thirty days; no order of Court is required or contemplated. That clearly appears, because where such orders are necessary the legislature have expressly required that they should be made; see Rules 13, 15, 17, 18. In Rule 5, on the contrary, nothing is required to be done either by the prisoner or any one else; it is provided simply that he shall be discharged without payment of costs. And the practice of the equity Courts is in accordance with this interpretation of the rule. Such was the opinion

in custody) upon process of contempt; and in case any such defendant shall not be brought to the bar of the Court within the respective times aforesaid, the sheriff, gaoler or keeper, serjeant-at-arms, or messenger in whose custody he shall be, shall thereupon discharge him out of custody without payment by him of the costs of contempt, which shall be payable by the party on whose behalf the process issued."

(*a*) 8 Rep. 146.

(*b*) 2 Wils. 313.

(*c*) 4 B. & C. 26.

(*d*) 11 East, 395.

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expressed by the Vice-Chancellor in a recent case, *Ex parte Dunn*, Easter term, 1836, MS. The attachment, therefore, was absolutely at an end when the thirty days expired, and the further imprisonment was without legal warrant. Here also the plaintiff actually demanded her release, and the detention after that was certainly a misfeasance. It is like the case of detention by the sheriff under a ca. sa. after an order by the plaintiff to discharge. The replication here is in the nature of a new assignment, as much so as the facts of the case would admit. It states an abuse of the authority of the defendant, and this is the correct form (*a*).—[Lord *Denman*, C. J.—In *Salmon* v. *Percival* (*b*) it was held that trespass would not lie against a serjeant-at-mace for not discharging the plaintiff out of custody upon tender of sufficient bail, although it were the duty of the officer to take the bail.]—It does not appear that by any positive enactment he was required to take bail.

R. V. Richards, in reply.—It is clear that the terms of the rule cannot be interpreted so absolutely as contended for. Suppose a detainer had been lodged against the defendant, it then would certainly become the duty of the sheriff to act in contravention of them. Nothing has been said to shew that the duty devolves upon the sheriff to ascertain the cause of the attachment or the lapse of the time. The replication is not in the nature of a new assignment. To have borne that character it should have replied that the cause of action was the detention subsequent to the expiration of the thirty days. The arguments are not, therefore, applicable to the replication as it actually exists.

Lord DENMAN, C. J.—The present action is certainly not maintainable. The authority in *Cro. Car.* is in point, and distinctly shews that if the plaintiff is liable at all he is only liable in an action on the case. The law compelled him to take the defendant into custody, he was authorised, under certain circumstances only, to discharge her; he clearly, therefore, was not a trespasser ab initio. And there is nothing in this case to shew that he ever had notice of the existence of those circumstances under which alone the defendant would have been entitled to her discharge.

LITTLEDALE, J.—I also am of opinion that this form of action is not maintainable under the facts of this case, and, even if it were, they are not properly stated in the replication. It is attempted upon this record to make the sheriff a trespasser ab initio; but, where he is lawfully entitled to take into custody in the first instance, he can only become so by an abuse of his authority afterwards. Where that has taken place it is inferred that he availed himself of his authority for the sole purpose of abusing it; and therefore the law does not allow him to shelter himself under it. In order to raise such an inference here, the replication should have stated a knowledge in the sheriff of the nature of the contempt and of the expiration of the thirty days. But the replication states nothing of the sort, and for any thing that appears the sheriff might have supposed that the attachment was still existing in full force. It is clear, therefore, that there is nothing to shew an abuse of authority in the sheriff, and he could only be liable, if at all, in an action on the case. But I think that under the circumstances the sheriff

(*a*) See *Greene* v. *Jones*, 1 Wms. Saund. 299, n. 6. (*b*) Cro. Car. 196.

was not liable to any action at all. The rule provides for the discharge of prisoners for contempt for two causes only. But parties may be guilty of contempt for many other causes than those two, and if committed for any of such other causes, the sheriff would have had no authority to discharge the defendant. Unless, therefore, he had distinct notice of the particular contempt for which the defendant was committed, I think he would not be liable to any action at all, and upon the present record it no where appears that he had any such notice.

PATTESON, J., and WILLIAMS, J., concurred.

Judgment for the defendant.

WILLIAMS *v.* BYRNE.

June 6.

A contract between *A.* & *B.* for *A.* to serve *B.*, and *B.* to employ *A. for one whole year from a certain day named, and so from year to year, to the end of each year commenced,* so long as the parties respectively please, is a yearly contract, and can only be determined at the end of a current year.

2. In an action for the breach of such contract, if either party rely upon the existence of a custom authorising him to determine the contract upon a reasonable notice previous to the end of a current year, such custom must be expressly alleged as a fact on the record, and it is not enough to aver simply that a reasonable notice was given.

ASSUMPSIT. The declaration stated, that in consideration that the plaintiff, at the request of the defendant, would enter into the employ of the defendant in the capacity of parliamentary reporter, and furnish reports, &c. *for one whole year from a certain day, to wit, from &c., and so from year to year to the end of each year commenced,* while the plaintiff should be so employed by the defendant as aforesaid, and reckoning each year to commence from a certain day, to wit, &c. therein for so long as the plaintiff and defendant should respectively please, for a certain salary or wages, to wit, a salary or wages at the rate of *5l. 5s.* per week, for and during each session of parliament; and at the rate, to wit, of *2l. 10s. 6d.* per week, for and during the remainder of the year; the defendant undertook and promised the plaintiff to employ him according to the terms of the agreement; and although the plaintiff entered into the employ of the defendant in the capacity and on the terms aforesaid, and so continued and furnished reports, &c. for a long space of time, to wit, for two years; and also for part of another year after that time, to wit, until &c., and although the plaintiff was ready and willing and offered to continue in the employ, &c. for the remainder of the said last-mentioned year so commenced; yet the defendant refused, &c. and wrongfully discharged him without any reasonable or probable cause, &c.

Plea. That before the discharge of the plaintiff, to wit, on &c., the defendant being desirous to determine the agreement and the employ of the plaintiff in the capacity aforesaid, tendered to him a large sum of money, to wit, &c. as salary and wages, the same being more than the amount of salary and wages to which the plaintiff would have been entitled if *a reasonable and usual notice of determining* the said agreement and employ had been given to the plaintiff by the defendant, and required the plaintiff immediately to quit his employ, and gave, at the same time, *reasonable and usual notice* of his intention, in case the said tender and requisition were refused, to determine the said agreement and employ, to wit, at the end of three weeks from &c.; and that the plaintiff refused to accept the said sum or to quit the employ. Wherefore the defendant, at the expiration of the notice, discharged and refused to employ the plaintiff, and the defendant is now willing to pay the said sum.

Special demurrer. The cause assigned for which was, that the matters

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alleged constitute no defence, for by the terms of the contract stated, the defendant was to employ the plaintiff by the year, and there was no stipulation enabling him to dismiss the plaintiff at the time or on the terms mentioned.

W. H. Watson, in support of the demurrer. The terms of the contract as set out expressly show that this was an absolute agreement for a yearly hiring. No notice therefore could avail to terminate it at any other time than at the expiration of one of the years of service. The custom whereby contracts between masters and menial servants may be terminated on a month's notice does not apply here; *Beeston* v. *Collyer* (*a*), *Fawcett* v. *Cash* (*b*). (He was then stopped by the Court.)

Mansel, contrà. Agreements of this kind are always determinable upon a reasonable notice, or upon a good ground for dismissal. This is laid down by *Burrough*, J. in *Beeston* v. *Collyer*. Generally, whether the notice has been reasonable is a question for the jury. That it has been so here is admitted by the demurrer. *Fawcett* v. *Cash* differs from the present case. There the dismissal was during the *first* year, and *Taunton*, J. seems to have thought that a dismissal after the first year would have stood upon another footing.—[*Littledale*, J.—The plea seeks to infer a contract inconsistent with that alleged in the declaration. The contract set out is for a year, and then from year to year to the end of each year. The plea sets up a right to dismiss on a reasonable notice.]—The law imports such a term into all contracts of this kind.

Lord DENMAN, C. J.—I have no doubt in this case. The declaration sets out a contract for one whole year, and so from year to year to the end of each year commenced. The defendant does not deny the existence of such a contract, but pleads that he offered a greater amount than the plaintiff would have been entitled to as salary if a reasonable notice had been given; that he gave the plaintiff reasonable notice; and that as the plaintiff refused to receive such amount or to determine the agreement, therefore he discharged him. There is nothing to shew that the contract authorised the defendant so to terminate the service. The defendant ought to have alleged that, by one of the terms in that contract, he was entitled so to put an end to the service; and then the jury would have determined whether that was so or not—what in fact was the contract between the parties. In these cases that is the real question in issue. In the case of domestic servants the custom is universal to dismiss upon a month's notice, the jury therefore infer that it forms a term of the contract.

LITTLEDALE, J.—(After stating the agreement.)—It seems to me, that under this agreement a new contract commenced at the end of each year to continue for the ensuing year, which could only be terminated at the end of the current year. The defendant says, that he gave reasonable and usual notice; but that is not sufficient, because the contract contains no such condition. The case of a menial servant has been referred to, who it is said may be dismissed upon a month's notice. But that is so only by custom, not by inference of law. And had this been such a case, which it is not, still

(*a*) 4 Bing. 309. (*b*) 5 B. & Ad. 904.

it would have been necessary to allege that custom as a fact on the record. If no such custom were pleaded to an action by a menial servant against his master on a yearly hiring, the Court could not infer one, and the contract must be interpreted in the same way as any other yearly contract.

PATTESON, J.—The contract as set out in the declaration is not denied. The only question therefore is, what is the legal interpretation of it? It is contended, that what is reasonable notice is a question for the jury. So it is where the parties have agreed to terminate the service upon such notice. But it is plain that under this contract, after a year had once commenced, the service was to continue to the end of it. What notice may have been necessary to terminate it at the end of that time it is unnecessary to consider; because it is admitted that the dismissal in this case was not at the end of the current year.

WILLIAMS, J.—The notice ought to have been to terminate the service at the end of the current year. The agreement expressly provides that the service in subsequent years shall continue to the end of each one commenced. The defendant therefore is in no better condition than if he had dismissed the plaintiff in the middle of the first year. No reasonable or probable ground is assigned to justify the dismissal. The judgment must therefore be for the plaintiff.

Judgment for the plaintiff.

CLAY *v.* STEPHENSON.

June 8.

A commission directed to the judges of a foreign court, requiring them to take the examinations of certain witnesses, to reduce them into writing, and to *send the same* to this Court, is not properly executed by a return of an examined copy of such examinations, although certified by an officer of the foreign court to be a correct copy, and such copy is therefore inadmissible in evidence.

MONEY had and received. Plea: non assumpsit. At the trial before Lord *Denman*, C. J. at the York Summer Assizes, 1835, the plaintiff tendered depositions taken under a commission to examine witnesses at Hamburgh as evidence in support of his case. The commission had been directed by the Court of King's Bench to the Judges of the Chamber of Commerce at Hamburgh, or any two or more of them, "on or before the 11th day of July ensuing the date thereof, to examine" certain persons therein named, upon interrogatories on their oaths, and contained also the following directions:—"And that you do take such their examinations, and reduce them to writing, on paper or parchment; and when you shall have so taken them, you are to *send the same* without delay to our Court of King's Bench, closed up under the seals of two or more of you, distinctly, plainly set together, with the interrogatories and the writ to be filed of record." The commission also directed them to swear the interpreters and clerks faithfully to interpret and write the depositions so taken. The return to this commission was in the German language, and headed thus:—"This is an extract of the minutes to which the certificate indorsed on the commission refers. *D. F. Worlée*, Assistant Actuary." "On this day, Wednesday, the 15th July, 1835, before Messrs. *G. F. Schmidt* and *D. F. Weber*, members of the Court of the Chamber of Commerce at Hamburgh, who, by an order of the same Court, dated the 11th July, 1835, granted at the request of Dr. *M. Pohls*, on behalf of *R. Clay* the younger, of Goole, were appointed as commissioners, whilst by the same order, *D. F. Worlée*, Assistant Actuary, one of

the sworn officers of the Court, was added to the commission for the purpose of keeping the minutes." The return then set out the depositions taken, and concluded thus:—"Whereby this act was closed and signed by the commissioners." (Signed on the minutes.) "*G. F. Schmidt*, Judge of the Court of Commerce; *D. F. Weber*, Judge of the Court of Commerce; *D. F. Worlée*, Assistant Actuary."

"The correctness of this act, and that the same entirely agrees with the original minutes, is hereby attested.

(Signed.) "*D. F. Worlée*, Assistant Actuary."

The commission itself was also returned, and had indorsed upon it the following certificate:—"The Court of Commerce of the free and Hanseatic town of Hamburgh certifies (or attests) the execution of the herein demanded examinations of the witnesses Languese and Precht, by referring to the extract of the minutes annexed herewith.

"*D. F. Worlée*, Assistant Actuary."

Several objections, on which a rule was afterwards obtained, were made at the trial to the admissibility of these depositions in evidence. His lordship, however, received them, and directed a verdict for the plaintiff, but gave the defendant leave to move to enter a nonsuit, on the ground that the evidence was improperly received.

Wightman, in Michaelmas term, 1835, obtained a rule nisi for a nonsuit or a new trial, and stated the following objections to the admission of the depositions in evidence. 1. That the examinations were not taken within the time required by the commission. 2. That the return to the commission was in the German language. 3. That copies of the examinations had been returned instead of the examinations themselves. He also moved on other grounds, relating to the substantial merits of the case, which the judgment of the Court renders it unnecessary to advert to.

Cresswell, *Alexander*, and *Cleasby* shewed cause (*a*).—The examinations were taken in time, for on the 11th of June, as required by the commission, the proceedings connected with the examinations may fairly be said to have commenced by the order of Court of that date. But even if there has not been a literal compliance with the commission in this respect, it is immaterial, for the directions as to time were not compulsory. In *Rex* v. *Lordale* (*b*), Lord *Mansfield* observed, "There is a known distinction between circumstances which are of the essence of a thing required to be done by an act of parliament, and clauses merely directory. The precise time in many cases is not of the essence. On this principle the 54 *Geo.* 3, c. 84, with respect to the time of holding quarter sessions, was, in *Rex* v. *Justices of Leicester* (*c*), held to be merely directory. Nor can it be said that the return is bad, because the depositions are returned in German, the language in which they were taken. The commission does not, as in *Atkins* v. *Palmer* (*d*), expressly require the examinations to be sent to England in the English language; they must in this case have been translated at all events for the jury. —[*Patteson*, J.—They are to be filed in this Court, which circumstance

(*a*) June 2, before Lord *Denman*, C. J., *Littledale*, *Patteson*, and *Williams*, Js.
(*b*) 1 Burr. 445.
(*c*) 7 B. & C. 6.
(*d*) 4 B. & A. 377.

implies that they should be in a language intelligible to the Court.] Lastly, no objection to the return can be made, on the ground that the document returned is a copy. The original examinations are records of the foreign court; this Court could therefore receive nothing more formal and authentic than it has received, namely, an examined copy, certified by an officer of the foreign court. In *Atkins* v. *Palmer*, translations made six weeks after the examination were considered sufficient.

Sir *F. Pollock*, *Wightman*, and *Cowling*, contrà.—All that was done on the 11th was to nominate persons to conduct the commission, in pursuance of which nothing was actually done until the 15th. The Court was limited with respect to time, in the same manner as an arbitrator, who must complete his award within the time prescribed in the reference. In *Atkins* v. *Palmer* the document returned was not a copy of any thing remaining with the commissioners, but was an original, although not made for some time after the examination. This return purports to be a mere copy.

Cur. adv. vult.

Lord DENMAN, C. J. now delivered the judgment of the Court:—We decide this case on one short ground. The principal evidence at the trial arose from depositions taken under a commission to examine witnesses. The commission directs the commissioners to take the examinations and reduce them to writing, and, when so taken, to send the *same* to us. Now it is clear that these examinations have not been returned to us, but copies bearing the certificate of an officer appointed for the purpose. We think the commission ought to be executed in its terms, and therefore that no copy could be received in evidence. There must therefore be a new trial.

Rule absolute for a new trial.

END OF TRINITY TERM, 1837.

IN THE EXCHEQUER CHAMBER.

TRINITY VACATION, 7 WILL. 4.

WRIGHT *v.* DOE on the demise of TATHAM.

June 13.

The sanity of a testator being the question in issue, letters addressed to him by persons of his acquaintance, long since dead, and found after the death of the testator, with the seals broken and open, in a cupboard under his bookcase in his private room, together with other letters, some indorsed by him, and to some of which he had written answers, are not admissible in evidence; per *Tindal*, C. J., *Parke*, B., *Bosanquet*, J., and *Coltman*, J.; *dissentientibus*, *Park*, J., and *Gurney*, B.

2. A letter so found addressed to the testator, desiring him to communicate with his attorney, who had lived at some distance from the testator, upon a matter of business, and who had been long since dead, and which was indorsed by the attorney, is admissible; per *Tindal*, C. J., *Park*, J., and *Gurney*, B.; *dissentientibus*, *Parke*, B., *Bosanquet*, J., and *Coltman*, J.

EJECTMENT for the manors &c. of Hornby and Tatham, in the county of Lancaster. The lessor of the plaintiff in the action claimed as heir-at-law of *John Marsden*; the defendant claimed as devisee in trust. An action of ejectment for the same property was tried before *Gurney*, B. at the Lancaster Lent Assizes, 1833, when a question having arisen as to the sanity of the testator, letters were tendered in evidence and rejected, which had been found among his papers shortly after his death, written to him by persons of his acquaintance, of whom all but one were dead; one of the

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letters purporting to be an answer to a letter written by the testator. A bill of exceptions was tendered, but the judgment thereupon did not decide the question as to their admissibility (*a*). At the second trial, also before *Gurney*, B., at the Summer Assizes, 1834, the letters were admitted. But a rule nisi for a new trial having been thereupon obtained, the Court of King's Bench decided that they were not admissible, and made the rule absolute (*b*). Upon the third trial before *Parke*, B. at the Lancaster Summer Assizes, 1836, three letters were tendered in evidence and rejected; upon which a bill of exceptions was tendered, which stated that "after the death of *John Marsden* many letters addressed to him by various persons were found with other papers in a cupboard under his bookcase in his private room, and that to many of these letters, letters had been written and sent in answer, which last-mentioned letters were proved to be in the handwriting of, and signed by, the said *John Marsden*; and that upon some others of them so found there were indorsements in the handwriting of the said *John Marsden*; and which letters, so answered and indorsed, were tendered and received in evidence upon the said matter in controversy, and at issue." Amongst these letters were found the three letters rejected, the first of which was addressed to the testator by one *Charles Tatham*, the brother of the lessor of the plaintiff, and a cousin of the testator, who was at that time in America. It was also proved that *Charles Tatham* was personally acquainted with the testator, and had been dead many years; that the testator was residing at the place to which the letter was addressed; and that the letter was marked with the London post mark as a ship letter, and was in the handwriting of the said *Charles Tatham*. The letter was as follows:—

"Alexandria 12th Octr 1784.

"My Dear Cousin,—You should have been the first person in the world I would have wrote to hadn't my time been employed by affairs that called for my more imedeate atention; in the first place I am call'd upon by my buseness it being the first consideration must by no means be neglected. As for my brother his goodness is such that I know he will excuse me till I am more disengaged: was I to write to him in my present embarased situation I perhaps might only do justice to my own feelings and he might construe it deceit, so different an opinion have I of him to mankind in general who above all things are fond of flattery. I shall now proceed to give you a small idea of what has pass'd since my departure from Whitehaven, as I suppose *Harry* long e're now has told you the rest. We sail'd the 14th July and had good weather the chief of the way, but as you know nothing of sea faring matters it is not worth while to dwell upon the subject. We reached the cape of Virginia the 13th September but did not get heare till the beginning of the present month, so we were about twenty day in coming 350 miles. When I arrived I was no little consirned to find the Town in a most shocking condition, the people dieing from 5 to 10 per day and scarsely a single house in Town cleare of descease, which proves to be the putrid fevour. I am going to Philadelphia in a few days if God spares my life and permits me my health and their I intend to stay till affairs here bare a more frendly aspect: and so the next time you here from me will be I expect from that place, tho' you'l please to direct to me heare as usual: God bless you my dear Cousin, and may you still be bless'd with health, which is one of greatest blessings we require hear, is the sinseare wish of Dr Cosn your affect. Kinsman and very Humble Servt *Charles Tatham*.

"P. S. Pray give my kind love to my Aunt my Brother and my cousin Betty: also

(*a*) *Wright* v. *Doe* d. *Tatham*, 1 Ad. & El. 3.

(*b*) 1 Har. & Wol. 729; 6 Nev. & Man. 132, *S. C.*

my compliments to all the rest of the Family and all others my former acquintances &c. Alexandria 12th Octr 1784."

Among the said papers was also found the following draft or copy of a letter in the handwriting of the testator, addressed to the said *Charles Tatham*.

" Dear Cousin,—I received your letter some time ago wherein you mentioned that you had sent me a map of the United States of America, to the care of Mr. *George Welsh*, merchant in Liverpool. I deferred writing till such times as I had made enquiry after it, but did not get the map till the 7th instant. You mentioned in your letter that you had sent me a small quantity of dried fruit; I received nothing but the map, for which I am obliged to you. My aunt has had very poor health since you left England, she has scarce ever been well; I am in hopes she is getting better again; I think that change of air and a journey would be of service to her. We have lately had an account of poor Mrs. *Smith*'s death; she died at Saint Alban's the 7th instant. My aunt has had a letter from your brother *Harry*, he is very well. It is reported that your acquaintance Mr. *John Bradshaw* is going to be married to a Miss *Fell* of Lancaster; whether there is any truth in it or not I cannot tell. I suppose you have received my last letter, wherein you will see an account of your nurse's death. I have nothing further to add but compliments from my aunt and your cousin *Betty*.

" *C. Tatham*, Esq. " I remain dear cousin your
" Wennington Hall, June 1st, 1787. " affectionate kinsman *J. Marsden*."

The second letter, which follows, was addressed to the testator at the place where he then resided, and was proved to be in the handwriting of *Oliver Marton*, by whom it purported to be written, then vicar of Lancaster, distant about eleven miles from the testator's residence. It was also proved that he was acquainted with the testator, and had been dead upwards of thirty years. Upon the letter were indorsed these words :— " 20th May 1786. Letter from Mr. *Marton* to Mr. *Marsden*." Which were proved to be in the handwriting of Mr. *Barrow*, who had been dead upwards of thirty-five years, and who at the time of the date was attorney to the testator :—

" Dear Sir,—I beg that you will order your attorney to wait on Mr. *Atkinson* or Mr. *Watkinson*, and propose some terms of agreement between you and the parish or township, or disagreeable things must unavoidably happen. I recommend that a case should be settled by your and their advice, and laid before counsel, to whose opinion both sides should submit, otherwise it will be attended with much trouble and expense to both parties. I am, sir, with compliments to Mrs. *Cookson*, your humble servant &c.

" May 20th, 1786. " *Oliver Marton*.

" I beg the favour of an answer to this."

The third letter was written by the Rev. Mr. *Ellershaw*, in the presence of a witness, at the time when the writer was about to relinquish the chapelry of Hornby, to which he had been appointed curate by the testator, who was the patron. He was proved to have been acquainted with the testator, and to have been dead some years :—

" Dear Sir,— I shall ill discharge the obligation I feel myself under, if in relinquishing Hornby I did not offer you my most grateful acknowledgments for the abundant favours of your hospitality and beneficence. Gratitude is all that I am able to give you, and I am happily confident that it is all that you expect. I have only therefore to assure you, that no circumstances in this world will ever obliterate from my heart and

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soul the remembrance of your benevolent politeness. May the good Almighty long bless you with health and happiness, and when his providence shall terminate your Christian warfare upon earth, may angels of the Lord welcome you into blessedness everlasting. It will afford me pleasure to continue my services during the vacancy, if agreeable to you. With every sentiment of respect and affection to yourself and the worthy family at the Castle, I hope you will ever find me your grateful faithful and obliged servant *Henry Ellershaw.*

"Please to deliver the inclosed to Mr. *Wright.*

"Chapel le Dale, 3rd October 1789."

The three letters to the testator were all found with seals broken and open.

The case was argued in the vacation after Hilary term, 1836, (February 6,) before *Tindal*, C. J., *Park*, J., *Gaselee*, J., *Bosanquet*, J., *Parke*, B., and *Gurney*, B., by Sir *F. Pollock* for the plaintiff in error, and by *Cresswell* for the defendant in error; it was again argued in the vacation after Easter term, 1836, (May 7,) before *Tindal*, C. J., *Park*, J., *Bosanquet*, J., *Coltman*, J., *Parke*, B., and *Gurney*, B., by Sir *F. Pollock* for the plaintiff in error, and *Starkie* for the defendant in error, and on this day, their lordships differing in opinion, judgment was pronounced *seriatim.*

COLTMAN, J.—Upon the trial of this case, exceptions were taken to the ruling of the judge, both on the part of the lessor of the plaintiff and on the part of the defendant. It is unnecessary to say anything upon the subject of the exceptions taken on behalf of the lessor of the plaintiff. The objections taken on behalf of the defendant relate to the admissibility in evidence of three letters, addressed to the testator by persons now deceased, well acquainted with him during their lives.

Before examining the particular circumstances of the case, in reference to the letters severally, it seems to me desirable to consider the more general question, whether, on an issue as to competency like the present, letters written by third persons to the party whose competency is in dispute, are admissible in evidence, though never received by the person to whom they are addressed.

It may be urged, in support of their admissibility, that competency or incompetency is a matter of opinion, and that such letters are evidence of the opinion entertained by the writers, or, at any rate, that the writing of them is an act done, and that where an act done is accompanied by a declaration of opinion, or, as it was expressed in the course of the argument, where a declaration of an opinion is embodied in an act done, it is admissible in evidence. Now, admitting that this is a question of opinion and judgment, we may ask how is matter of opinion required by the law of England to be proved? The general rule is, that it is to be proved by the examination of witnesses upon oath. The administering of an oath furnishes some guarantee for the sincerity of the opinion, and the power of cross-examination gives an opportunity of testing the foundation and the value of it. Such being the general rule, it is necessary for the party who brings forward evidence not on oath, to shew some recognised exception to the general rule within which it falls.

"The true line (says Mr. Justice *Buller*, in *Rex* v. *Eriswell* (*a*),) for courts of justice to adhere to is, that wherever evidence not on oath has been re-

(*a*) 3 T. R. 719.

peatedly received and sanctioned by judicial determinations, it should be allowed: but beyond that, the rule that no evidence shall be admitted but what is on oath, shall be observed." It was admitted in the argument, that our law books furnish no instance of such evidence having been received—an admission of itself, according to Mr. Justice *Buller*, sufficient to cause it to be rejected. It may be urged, that evidence of opinion is admitted in some cases without oath, as for instance, where reputation is given in evidence to prove a public right. It is a sufficient answer to say, that those cases belong to a recognised class, forming an admitted exception to the general rule, and are limited and guarded by various restrictions. The evidence under consideration does not fall within the principle on which the exception is founded, and it is excluded by the restrictions which limit the exception. The principle on which I conceive the exception to rest is this;—that the reputation can hardly exist without the concurrence of many parties interested to investigate the subject; and such concurrence is presumptive evidence of the existence of an asserted right, of which, in most cases, direct proof can no longer be given, and ought not to be expected; a restriction now generally admitted as limiting the exception is this, that the right claimed must be of a public nature, affecting a considerable number of persons. In the question under consideration, the point in issue is capable of direct proof in the widest sense, and it is strictly a question of a private nature.

If such letters are admissible simply upon the score of their being evidence of the opinion of the writers, I can see no reason why their verbal declarations should not be so, or their letters to a third party. It is no answer to say, that they are excluded as being res inter alios actæ, for the same objection would apply in all cases where reputation and the declarations of deceased persons are given in evidence.

But it is contended, that the writing of a letter is an act done, and that the contents of the letter are a declaration accompanying the act; and that an opinion (though not evidence per se) is yet evidence when embodied in an act. Now it appears to me, that if the letter is admissible on this ground, it must be, either because the act is evidence by itself, or because the opinion is evidence. Where an act done is evidence per se, a declaration accompanying that act may well be evidence if it reflect light upon or qualifies the act. But I am not aware of any case where the act done is, in its own nature, irrelevant to the issue, and where the declaration per se is inadmissible, in which it has been held that the union of the two has rendered them admissible. Now, to see whether the act of writing one of the letters in question is admissible, nakedly, and per se, we must strip the case of all other circumstances, and suppose the simple fact proved, that *J. S.*, being a stranger to Mr. *Marsden*, wrote a letter to him, and put it into the post office; that the letter was there destroyed, and that its contents are unknown. *J. S.* being a stranger to Mr. *Marsden*, and, for anything that appeared, quite ignorant of the state of his mental capacity, I would ask whether the writing of a letter under these circumstances would be evidence? Surely not; it would be a fact simply irrelevant, and inadmissible on that ground. It seems to follow, that the sending of a letter is not evidence, except on the ground that it contains a declaration of opinion, for if you strike out (as in the case just supposed) everything which contains any indication of opinion, the fact is merely irrelevant. You have then a fact which is irrelevant, and an opinion which is inadmissible: how can the union of the two furnish competent evidence

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for the determination of the point in issue, which neither of them, separately, has any legal tendency to prove?

If the view I have taken of this case be so far correct, the result is, that in the case I have been considering, letters are not evidence, unless received by the party to whom they are written; nor could the bare receipt of them make any difference, unless they were in some way acted upon. But it cannot be doubted that any act done by the testator, with reference to them, would be evidence, for it is difficult to say that any act of his is irrelevant to the issue; and such act may make the letter with which it is connected admissible, as explaining the nature of the act done, and indicating the extent of his capacity. The question, therefore, comes to this;—is there evidence sufficient to shew that the testator had done any act with respect to these letters? If there is, they ought, as it seems to me, to have been admitted in evidence; if not, they were properly rejected. I will consider first the letter which stands first in order in the bill of exceptions. This letter is addressed to Mr. *Marsden* by his kinsman *Charles Tatham*, and is dated October 12, 1784. It should be considered with reference to the letter of Mr. *Marsden* to the same *Charles Tatham*, dated June 1, 1787. The letter last mentioned contains no reference to that of October 12, 1784, but as it does advert to a letter received by the writer from *Charles Tatham*, and to another letter written by Mr. *Marsden* to *Charles Tatham*, it furnishes ground for inferring that a correspondence was carried on between them. It may be said, that the mere fact of a correspondence being carried on by Mr. *Marsden* is some evidence of capacity, and that each link in the chain is relevant to the question at issue, as tending to prove the fact that a correspondence was carried on; but, on consideration, it seems to me that the mere fact of a correspondence being carried on, abstracted from all proof of the nature of it, is not evidence.

The term 'correspondence' involves in it the idea of some sequence and connexion of ideas, and cannot strictly be applied to a set of letters, without a tacit reference to their nature and contents. We must, therefore, look at the contents of the letters. Those written by Mr. *Marsden* may be good substantive evidence, but those written to him stand on a different footing. They may be admissible by way of explaining such of Mr. *Marsden*'s letters as refer to them, or are written in answer to them; but when they are wholly isolated and independent, and where nothing is done upon them, they can only be considered as declarations of opinion, and as such, they are, in my judgment, inadmissible.

The question, then, upon this letter of October the 12th, 1784, is reduced to this;—whether there is any proof of an act done by Mr. *Marsden* in reference to it? The case shews that it was found after his death, in a cupboard under his bookcase, in his private room, amongst other letters, some of which were indorsed in his handwriting, and to others of which answers had been sent, also in his handwriting. The act he had done is the opening of the letter and the placing it in a proper place of deposit. The expression "after his death," is somewhat vague, but taking it to mean immediately after his death, we have here an act done by some one, and the question is, by whom it must be inferred to have been done? If Mr. *Marsden* is considered as a person of competent understanding, the natural inference would be, that he did it; if he is not so considered, no such inference arises. Now, his competency being the matter in issue, no assumption must be made either way.

Now on whom does the burden of proof lie? Obviously upon the party contending for the admissibility of the evidence; he must shew an act done by Mr. *Marsden*. It is not enough for him to say no inference can be drawn either way; he must prove affirmatively, that an inference arises from the facts found, that Mr. *Marsden* did the act; but the inference does not arise unless Mr. *Marsden* is assumed to be competent. It seems to me, therefore, that the letter now in question was inadmissible.

With respect to the letter of Mr. *Marton*, the case stands more favourably for the defendant than in the case of the letter last considered, in this respect, that the acts done in reference to it are stronger, if shewn to be done by Mr. *Marsden;* but there is in this case also the same deficiency of proof that the acts done, were done by Mr. *Marsden*. It seems to me, therefore, that this letter, and that the third letter also, is inadmissible on the ground above explained. The result is, that in my opinion the judgment of the Court below should be affirmed.

GURNEY, B.—The history of this cause is extraordinary, and certainly not satisfactory. It came on first in the shape of an issue of devisavit vel non, at the Lent assizes, 1830. On that trial, the letters to which there were no answers, and on which there were no indorsements, were tendered and rejected, and a verdict found establishing the will; the execution of the will being proved by Mr. *Bleasdale*, one of the attesting witnesses. Application was made to the Lord Chancellor for a new trial, which application was dismissed (*a*). The heir at law brought an ejectment, which was tried at the Lent assizes at Lancaster, 1833; upon that trial two questions arose:—

First, the admissibility of letters, which were, upon the authority of the former decision, rejected. The other, whether the will could be read without producing the surviving attesting witness, Mr. *Bleasdale* being dead. The defendant contended that he was entitled to read the will upon the evidence of the verdict on the former trial. He gave in evidence, also, the testimony of Mr. *Bleasdale* upon the former trial, but did not contend for the admissibility of the will in evidence upon that ground. It was ruled, that the will could not be read. Upon these two matters a bill of exceptions was tendered.

When the bill of exceptions came on to be heard in this Court, before seven judges, they were unanimously of opinion that the will was receivable in evidence, not upon the ground which had been contended at the trial, of the former verdict, but upon the evidence of Mr. *Bleasdale*, given at the first trial, which, being proved, was the same as if he had been living. But upon the question respecting the letters, the judges being divided in opinion, four for receiving and three for rejecting them, no judgment was given.

At the summer assizes of 1834, the cause again came on to be tried. Upon the production of those letters an objection was taken pro formâ without any argument, and the letters were received. Upon a motion for a new trial, the Court of King's Bench were of opinion that the letters ought not to have been received in evidence, and a new trial was granted, which came on at the last summer assizes, and on that trial those letters were offered in evidence, and, conformably with the decisions of the Court of King's Bench, were rejected, upon which this bill of exceptions was tendered.

(*a*) *Tatham* v. *Wright*, 2 Russ. & Mylne, 1.

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Thus the venire de novo was granted upon a point which the judges had never been called upon to decide, and the new trial was granted upon a point which was decided in conformity with the opinion of the majority of this Court; and this bill is tendered upon the decision founded on the authority of the Court of King's Bench.

It is stated in the bill of exceptions, that the matter in controversy was, whether Mr. *Marsden*, from his attaining to competent age in the year 1779, and down to the time of his making the will and codicil in the years 1822 and 1825, was a person of sane mind and memory, and capable of making a will. And to maintain the affirmative of the matter in controversy these letters were tendered in evidence. The facts are thus stated:

"That after the death of Mr. *Marsden*, many letters addressed to him by various persons were found, with other papers, in a cupboard under his bookcase in his private room, and that to many of those letters, letters had been written, and sent in answer, which last-mentioned letters were proved to be in the handwriting of, and signed by him, *John Marsden*; and that on some others of the letters so found there were indorsements in the handwriting of the said *John Marsden*, and which letters, so answered and indorsed, were tendered and received in evidence upon the said matter in controversy."

It appears, therefore, that Mr. *Marsden* had a private room, and in a cupboard under the bookcase in that room were found letters of various descriptions,—some to which he had given answers, and the letters and answers were read in evidence; some which he had indorsed; these too were read in evidence,—and the three letters in question, upon which there were no indorsements written by him.

Upon the first trial, which underwent the review of the Court of King's Bench, the letters that were offered in evidence were many in number. Upon the trial which is now under the consideration of this Court, the letters tendered are reduced to these three. One of these letters was written in the year 1799 by the Rev. *Henry Ellershaw*, who had been for many years perpetual curate of Hornby, Mr. *Marsden*'s parish, to which curacy he had been presented by Mr. *Marsden*, and it was written upon the occasion of his relinquishing that preferment, and written in the presence of his curate. The second by *Charles Tatham*, the brother of the lessor of the plaintiff, on his arrival in America. The third by the Rev. *Oliver Marton*, vicar of Lancaster. The two latter of these letters were not, when under the consideration of the Court of King's Bench, accompanied by those circumstances which now distinguish them from the rest.

All the transactions of this gentleman's life were subjected to the view and consideration of the jury, to enable them to form their judgment of the competency or incompetency of his mind; all that he said, and all that he did, and all that he omitted to say, and to do. It appears to me that the ransacking this, which I think must be taken to be his depository of papers and letters, affords no insignificant means of judging of his competency. If the letters had been found with the seals unbroken, that might have afforded evidence of a total want of curiosity, if not of imbecility of mind; the finding them with the seals broken is, I think, primâ facie evidence that they had been opened and read by him to whom they were addressed, and in whose repository they were found.

It is said that this supposition is founded on a presumption of competency,

which is the question to be tried. When it is stated that these unindorsed and unanswered letters were found in company with some letters which were indorsed by Mr. *Marsden*, and with others which were answered by him, and the letters in his own hand produced and read, I do not see that it is forming any presumption of his competency, to assume that the seals had been broken and the letters read by him. It appears to me that it is only from a presumption of his incompetency that any other inference is to be drawn.

The question is not, what is the weight of the evidence when received; the question is not, whether any suspicious circumstances may or may not attach to it; all that is matter of observation to the jury. If any facts could be introduced to raise a suspicion that these letters were foisted into this place by any other person than Mr. *Marsden*, they would doubtless have their effect where they ought to have it, but nothing of that sort is stated. The letters bear every mark of genuineness; they were written at periods very remote, when no question of the competency of this gentleman had arisen. They were written by persons well acquainted with him, and these persons were dead long before this question arose. I think, therefore, that the contents of this repository are evidence; evidence of more or less value, according as they are fairly, or unfairly laid before the jury; evidence of no importance, or even affording just grounds for suspicion, and for adverse presumption, if garbled.

It is said, who knows that these letters were deposited in this cupboard by Mr. *Marsden?* I think that the company in which they were found is primâ facie evidence that they were deposited by him, they were found in the same place with the letters which he had indorsed and the letters which he had answered. It is matter of inquiry for the jury, whether any other person was likely to have deposited them there; whether any other person used or sat in that room; whether the letters produced were all the letters that were found, or whether they were garbled.

On an indictment for high treason, letters, with the seals broken, found in the possession of the person indicted, are evidence against him, although there be no indorsement of his, and no letter of his own in answer; because the presumption is, that the seals having been broken, he has read them, and that, having read them, he has preserved them; so here, I think that the finding them raises the same presumption, and that it is not a sufficient answer that this is a question of competency.

Upon the other two letters the argument for their reception is much stronger.

First, the letter of *Charles Tatham*. It appears that in 1784 *Charles Tatham* went to America, and on his arrival he wrote this letter to Mr. *Marsden*, which bears the mark of a ship-letter, and has the post mark. If nothing more appeared, it would stand upon the same footing as the letter of Mr. *Ellershaw;* but, further, there was found among the said papers of Mr. *Marsden* a draft of a letter from Mr. *Marsden* himself to *Charles Tatham*, dated in June, 1787, which proves that these parties had been from the year 1784 till that time in a course of correspondence, for he says,—"I received your letter some time ago, wherein you mention that you have sent me a map of the United States of America. I deferred writing till such time as I had made inquiry after it, but did not get the map till the 7th instant. You mention in your letter, that you had sent me a small parcel of dried fruit; I

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received nothing but the map, for which I am obliged to you," &c. "I suppose you have received my last letter, wherein you will see an account of your nurse's death."

It is objected that this draft of a letter does not make the letter of 1784 evidence, because it is not an answer to that specific letter. I cannot see the difference between a letter which acknowledges another of a series of correspondence, and a letter which acknowledges the letter in question. If it had acknowledged both together, that, it is admitted, would have made it evidence. If the draft had been,—"My dear cousin, I have received your letter of the 12th of October, 1784," and nothing more, that would have made it evidence; but his answering another letter of the series, commenting upon the terms of that letter, acknowledging the receipt of one thing, and noticing the non-receipt of another, which ought to have accompanied it, &c. &c., that does not make it evidence, because it refers to a later letter of the series. The distinction appears to me to be too refined.

Lastly, there is the letter of the Rev. *Oliver Marton*, the vicar of Lancaster, the county town, a few miles from which Mr. *Marsden* lived, written to him on business, requiring professional assistance, requesting that Mr. *Marsden* will order his attorney to wait on one of two gentlemen who are named, to propose terms of agreement between himself, and the parish, recommending that a case be settled by the two attorneys, and laid before counsel. This letter, written fifty-one years ago, by a gentleman intimately acquainted with Mr. *Marsden*, is found to have been in the hands of Mr. *Barrow*, the attorney of Mr. *Marsden*, who has been dead thirty-five years, and there is an indorsement on the back of the letter in the handwriting of Mr. *Barrow*, "20th May, 1786, letter from Mr. *Marton* to Mr. *Marsden*." It is objected that this letter is not evidence, because it is not proved, first, that the letter was received by Mr. *Marsden*; secondly, that it was by him shewn to Mr. *Barrow*; thirdly, how it came back into the hands of Mr. *Marsden*; and fourthly, when Mr. *Barrow* made that indorsement.

I think that these observations are applicable only to the effect of the evidence when produced, not to its production; they are to be addressed to the jury. To require such proof of events that occurred half a century ago is to require impossibilities; the only persons who could have given it have been long in their graves. The legitimate inferences to be drawn from this letter thus indorsed are, that the letter was received by Mr. *Marsden*; that he did, either personally, or by letter, consult Mr. *Barrow* upon the subject, and that Mr. *Barrow* had the letter under his consideration, and probably returned it to him with the advice that he thought proper to give upon it. That is the natural and ordinary course of things, and I do not think that we are called upon to presume every thing that is forced, and unnatural, to exclude evidence from the consideration of the jury.

BOSANQUET, J.—The subject now under discussion was brought before the Court upon a former occasion, together with another question, which forms the second part of the bill of exceptions in the present case. Upon that other question the Court was unanimous, and a venire de novo was awarded; but I am not aware that as to the present question any decided opinion was expressed, or entertained by a majority, or any particular number of judges who then constituted the Court. For myself I can say that I had come to no distinct conclusion upon the subject, but as the judges, upon discussion among them-

selves, did not appear likely to come to an unanimous judgment respecting the admissibility of the letters, the decision of the Court was pronounced upon the second question only. I must, therefore, consider the first question in this case as if it had never been raised in this Court before.

Upon the bill of exceptions it is stated that the matter in controversy between the parties at the trial was, whether or not the testator was and had been, from his attaining to competent age, in 1779, and to the time of his making his will and codicil in 1822, and 1825, a person of sane mind, and memory, and capable of making a will. In support of the affirmative, three letters were tendered in evidence, on which the following questions arise:—

First. Whether letters addressed to the testator by persons well acquainted with him, and since deceased, which letters were found among the testator's papers, after his death, but do not appear to have been recognised in any way by the testator, are admissible in proof of his capacity.

Secondly. If not admissible, without some recognition of them by the testator, whether any one of the letters, set forth on the record, is shewn to have been recognised by the testator.

First. The letters cannot be admissible, unless they are relevant to the matter in issue, which matter is the capacity of the testator. The contents of the letters have no direct relation to the testator's state of mind, but may be taken to shew the opinion of the writers that the person addressed was of competent understanding. If the writers of these letters were produced as witnesses, and examined upon oath, their opinions would be receivable in evidence, because the grounds of their knowledge, and the credibility of their testimony might be ascertained by cross-examination.

But I know of no rule by which the opinion, however clearly expressed, of a person however well informed, is receivable as evidence, unless it be given in the course of legal examination. No precedent has been referred to in which such evidence has been admitted upon a trial at law. The extensive and dangerous consequences of allowing such evidence are too obvious to require observation. In all cases where the judgment of third persons upon any matter in issue is receivable, personal examination upon oath is required. Indeed, it has not been contended that mere matter of opinion, though given by a deceased person, ought to be received. But it is said that letters addressed to the testator are not to be considered as containing matter of opinion only, but that they are acts done. Undoubtedly they are acts done by the writers, but they are not acts done by the testator. It is said that they are evidence of the manner in which the testator has been treated. If by "treatment" of the testator is only meant the manner in which certain persons of his acquaintance acted in respect of him, I am of opinion that their treatment affords no test of the testator's capacity. If the treatment affect the testator himself, as where language of insult, contempt, or ridicule is employed in his presence, his own conduct, and deportment consequent upon such treatment, afford evidence from which the condition of his mind may be inferred. But I can see no sound distinction between letters written by one relation of a testator to another, and letters addressed to himself, unless the latter be received by the testator, in which case the relevancy of the evidence consists not in the contents of the letters, but in the testator's conduct in respect of them. Unless the testator be made party to the act by his privity to it, the act shews nothing but the opinion of the agent.

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The authority of cases in the Ecclesiastical Courts has been relied on, in which Courts letters, under the circumstances now objected to, have been received in evidence, and several cases have been referred to; *Buttin* v. *Barry*, 16th January, 1834, cited arguendo (*a*); *Wheeler* and *Batsford* v. *Alderson* (*b*); *Waters* v. *Howlett* (*c*); and two others not reported, *Morgan* v. *Boys*, and *Harvey* v. *Jones*, December, 1836. In neither of the two first of these cases was the point decided. In the first the memorial written for the testator is stated to have been adopted by him, as well as found among his papers. In the second, the judge certainly refers to a letter written by the father of the testatrix, to a person who paid his addresses to her, though she was not shewn to have been privy to such letter. But the propriety of admitting such letter was not made a point in the cause. In the third case we are informed, though it does not appear in the printed report, that a letter written to the testatrix by her brother from France, not referring to any other letter, and not replied to, was received by the judge (Sir *John Nicholl*) after objection made; and Sir *Herbert Jenner* is stated to have decided the same thing, in the two last cases, notwithstanding the judgment of the Court of King's Bench (*d*) was cited, saying that such evidence had always been received. It is not the province of this Court to consider whether such evidence is properly receivable in the Ecclesiastical Courts. Those Courts are constituted upon principles very different from those which regulate the Courts of common law. Where the judge is authorized to deal both with the facts and the law, a much larger discretion with respect to the reception of evidence may not unreasonably be allowed than in the Courts of common law, where the evidence, if received by the judge, must necessarily be submitted entire to the jury. By the rules of evidence established in the Courts of law, circumstances of great moral weight are often excluded, from which much assistance might in particular cases be afforded in coming to a just conclusion, but which are nevertheless withheld from the consideration of the jury upon general principles, lest they should produce an undue influence upon the minds of persons unaccustomed to consider the limitations and restriction which legal views upon the subject would impose. This is matter of daily experience, and requires no illustration by examples.

I do not think, therefore, that the practice of the Ecclesiastical Courts ought to govern our decision; and I can find no principle in the law of evidence recognised either by text writers, or by the Courts of common law, under which the evidence stated in the first question can be ranged. Where the capacity of a person is not the matter in controversy, his knowledge of letters, and of other things found in a place accessible to him, in his own house or apartments may sometimes be presumed, such as writings connected with the charge, upon a charge of treason; notes or other documents, forged or partly forged, upon a charge of forgery; instruments of coining or housebreaking, upon charges of coining or burglary (*e*). But where capacity itself is the only object of inquiry to which the proof is directed, knowledge cannot be presumed for the purpose of proving capacity. I am therefore of opinion that letters addressed to the testator by persons well acquainted with him, and since deceased, and which letters were found among the testator's papers

(*a*) 1 A. & E. 8.
(*b*) 3 Hag. Eccl. Rep. 609.
(*c*) 3 Hag. Eccl. Rep. 790.
(*d*) 1 A. & E. 1.
(*e*) 2 Stark. Ev. 801, and notes.

after his death, unless recognised by the testator himself, are not admissible in evidence to prove his capacity.

Secondly. The three letters tendered in proof of the testator's capacity are stated to have been found, after the testator's death, open and with the seals broken, in a cupboard under a bookcase in the testator's private apartment, among other letters, some of which had been answered and others indorsed by him. If I am correct in holding that the relevancy of these letters depends upon the testator's conduct with respect to them, his conduct is a matter of fact to be proved by the party who seeks to use the letters. If the testator is shewn to have dealt with the letters as a sensible man would deal with them, his doing so will afford evidence of his capacity. But until it appears that he has acted personally in the matter, there is nothing from which any inference as to his state of mind can be drawn. Capacity or incapacity to make a will is the matter to be ascertained. In other words, the question is, whether he has been in a condition to manage his own concerns, or whether his condition has been such that they must necessarily have been managed for him by others? Such being the real question to be tried, no presumption is to be made that any act bearing upon it was either done by the testator, or by any other person for him; since the whole value of the act, as evidence of the testator's mind, depends upon the part which the testator himself has taken in it. The letters may have been opened, arranged and deposited in the cupboard by the testator himself, or by his steward, attorney, or other agent. The facts are perfectly consistent with either view of the case, and the latter may have been the case without any imputation of fraud. There is nothing in the record to shew that the place where the letters were found was not accessible to others, as well as to the testator himself, even in the testator's lifetime; and it does not appear at what period, or by whom, or under what circumstances they were found in the cupboard after his death. It might be the proper place for the deposit of testator's letters. But the mere fact of the letters being found there, affords no evidence personally applicable to the testator, unless it be established that he placed them there himself.

It has been urged that these letters were found among others answered, and indorsed by the testator himself. Those letters were properly received in evidence, because the testator himself was shewn by legitimate evidence to have acted upon them. But his having acted upon those letters affords no evidence that he had placed among them the letters not acted upon. Indeed, if the admissibility of the letters indorsed or answered to prove the testator's state of mind had depended upon their having been deposited personally by the testator in the particular place in which they were found, I am not prepared to say that the testator's personal act in placing them there could be inferred from his previous recognition by indorsing and answering them.

It has been further argued, that the privity of the testator to all the three letters in question appears upon distinct grounds applicable to each. The letter written by *Charles Tatham* is contended to be receivable as part of a correspondence between himself and the testator. The letter in question is dated Alexandria, 20th October, 1784. It does not refer to any letter received from the testator, nor does it appear to have been answered by the testator. But a draft of a letter in the testator's hand to *Charles Tatham*, dated the 1st of June, 1787, was produced and received in evidence, which

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draft acknowledges the receipt of a letter some time ago from *Charles Tatham*, in which he mentioned having sent to the testator a map of the United States of America, and some dried fruit, but in which he makes no allusion whatever to any of the matters contained in the letter of the 20th October, 1784. This draft, therefore, cannot be used as a recognition of the letter of *Charles Tatham*, written three years before, and consequently cannot afford any evidence of the impression on the testator's mind evinced by him on the perusal of it. The second letter was addressed to the testator by *Oliver Marton*, the vicar of Lancaster, dated the 20th May, 1786, in which the writer begs the testator to order his attorney to wait on Mr. *Atkinson* or Mr. *Watkinson*, for the purpose of getting a case stated for the opinion of counsel, respecting some matters in difference between the testator and the parish, and requesting an answer. No answer appears to have been given, nor has any personal act of recognition by the testator been proved. But after his death the letter was found in the cupboard, indorsed in the handwriting of Mr. *Barrow*, who was the testator's attorney, "20th of May, 1786. Letter from Mr. *Marton* to Mr. *Marsden*." Mr. *Barrow* had been dead above thirty-five years at the time of the trial. It was strongly contended, that as the letter appeared by the indorsement to have come to the hands of Mr. *Barrow*, the testator's attorney, the testator must be presumed to have given it to him, pursuant to the request contained in the letter, and that his having done so afforded evidence of his understanding the letter and acting upon it. If the delivery of the letter to *Barrow* by the testator be assumed, the consequence deduced from it will be just. But upon what ground can that fact be assumed, in a case where the issue turns upon the testator's mental soundness or unsoundness—upon his capacity or incapacity to act reasonably for himself? It is reasonable that a person who receives a letter addressed to him containing a request to give orders to his attorney, should give orders accordingly. But if the giving such orders be relied upon as proof of the receiver's reason, it ought to be shewn that the orders were given by him. That fact is the only foundation upon which the inference rests, and without proof of which no inference whatever can arise. In truth the course of reasoning is this,—the testator delivered the letter to *Barrow*, because he understood it, and he understood it because he delivered it. In this case it is in no way shewn how the letter came into *Barrow's* hands, nor when he indorsed it, whether he received any orders respecting it, whether any thing was done upon it, nor upon what occasion it came out of *Barrow's* hands again, and found its way to the cupboard in the testator's house. The testator's affairs may have been conducted by his man of business, and from the nature of the case it is quite as likely that the letter should have been given or sent to *Barrow* by him as by the testator. At all events the supposition is not inconsistent with any thing that appears upon the record.

It has been said, that if the presumption of the testator having given or sent the letter would have been receivable in the case of a person whose reason was not the subject of inquiry; to withhold such presumption is to assume incapacity. In my opinion, neither capacity nor incapacity is to be assumed; but where the question is, whether the one or the other was the state of mind to be ascribed to the testator, the question cannot be resolved without proof that all rational acts relied upon were the acts of the testator himself. It may be here observed, that a question arises upon this letter

which affects the presumption that all the three letters in question were placed in the cupboard by the testator, on account of their being found among other letters indorsed or answered by him. Who placed *Marton's* letter in the cupboard? That letter was indorsed by *Barrow*, the testator's attorney: how and when did it come back from his hands? Did he place that letter in the cupboard? If he did, why may he not have arranged the other letters for the testator, and placed them in the cupboard also? If the indorsement of the testator's attorney does not prove his having put the particular letter which he indorsed in the cupboard, what ground is there for inferring, from the mere indorsement of some letters by the testator, that he placed in the cupboard all the letters, indorsed and unindorsed, which were found there? The grounds, when examined, appear to me far too loose to afford the foundation for any inference at all.

The last of the three letters, dated 3d October, 1799, was addressed to the testator, and was written by *Henry Ellershaw* in the presence of *John Garnett*, his assistant, when *Ellershaw* was about to relinquish the chapelry of Hornby, to which he had been presented by the testator, and contains strong expressions of the writer's gratitude and affection. No other circumstance having been adduced to shew the testator's personal recognition of this letter beyond that of its being found with the others, it is scarcely necessary to say that if the two first letters ought to be rejected, this must, à fortiori, be rejected also.

It is obvious that the contents of letters may be dictated by various motives, according to the dispositions and circumstances of the writers. Language of affection, of respect, of rational or amusing information, may be addressed, from the best of motives, to persons in a state of considerable imbecility, or labouring under the strangest delusions. The habitual treatment of deranged persons as rational, is one mode of promoting their recovery. A tone of insult or derision may be employed in a moment of irritation in writing to a person in full possession of his reason. What judgment can be formed of the intention of the writers, without an endless examination into the circumstances which may have influenced them? And what opinion can be collected of the capacity of the receiver, without ascertaining how he acted when he read the language addressed to him? To me it appears, that the admission, in proof of capacity, of letters, unaccompanied by other circumstances than such as are stated on this record, would establish an entire new precedent in a Court of common law, from which very great inconvenience might result upon trials of sanity, as well of the living as of the dead; consequently, that the evidence was properly rejected by the judge of assize, and that the judgment of the Court of King's Bench ought to be affirmed.

PARKE, B. (after stating the record).—The question for us to decide is, whether all or any of the three rejected letters were admissible evidence on the issue raised in this case, for the purpose of shewing that Mr. *Marsden* was from his majority in 1779, to and at the time of making of the alleged will and codicil in 1822 and 1825, a person of sane mind and memory, and capable of making a will.

It is contended on the part of the learned counsel for the plaintiff in error, that all were, on two grounds.

First, that each of the three letters was evidence of an act done by the

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writers of them *towards* the testator, as being a competent person; and that such acts done were admissible evidence upon this issue proprio vigore, without any act of recognition, or any act done thereupon by him.

Secondly, that in each of the three cases mentioned in the bill of exceptions, or at least in one of them, there was sufficient evidence of an act done by the testator, with reference to those letters respectively, to render their contents admissible evidence by way of explaining that act upon the principle laid down by the Court of King's Bench, in the 6 *Nevile & Manning*, 146. I am of opinion, upon a careful consideration of the case, and the argument on both sides at this bar, that none of the three letters were admissible, either on one ground or the other. It will be convenient, and facilitate the arrival at a just conclusion, to keep these two questions entirely distinct from each other.

First, then, were all or any of these letters admissible on the issue in the cause as acts done by the writers, assuming, for the sake of argument, that there was no proof of any act done by the testator upon or relating to these letters, or any of them,—that is, would such letters, or any of them, be evidence of the testator's competence at the time of writing them, if sent to the testator's house, and not opened or read by him? Indeed, this question is just the same as if the letters had been intercepted before their arrival at his house, for in so far as the writing and sending the letters by their respective writers were acts done by them towards the testator, those acts would in the two supposed cases be actually complete. It is argued that the letters would be admissible, because they are evidence of the *treatment* of the testator as a competent person by individuals acquainted with his habits and personal character, not using the word *treatment* in a sense involving any *conduct* of the testator himself; that they are more than mere statements to a third person, indicating an opinion of his competence by those persons; they are acts done *towards* the testator by them, which would not have been done if he had been incompetent, and from which, therefore, a legitimate evidence may, it is argued, be derived that he was so.

Each of the three letters, no doubt, indicates that in the opinion of the writer the testator was a rational person. He is spoken of in respectful terms in all. Mr. *Ellershaw* describes him as possessing hospitality and benevolent politeness; and Mr. *Marton* addresses him as competent to do business, to the limited extent to which his letter calls upon him to act; and there is no question but that if any one of those writers had been living, his evidence, founded on personal observation that the testator possessed the qualities which justified the opinions expressed or implied in his letters, would be admissible on this issue. But the point to be considered is, whether *these letters* are admissible as proof that *he did possess these qualities.*

I am of opinion, that according to the established principles of the law of evidence the letters are all inadmissible for such a purpose. One great principle in this law is, that all facts which are relevant to the issue may be proved; another is, that all such facts as have not been admitted by the party against whom they are offered, or some one under whom he claims, ought to be proved under the sanction of an oath, (or its equivalent introduced by statute, a solemn affirmation,) either on trial of the issue, or some other issue involving the same question between the same parties, or those to whom they are privy.

To this rule certain exceptions have been recognised; some from very early times, on the ground of necessity or convenience; such as the proof of the quality and intention of acts by declarations accompanying them; of pedigrees, and of public rights by the statement of deceased persons, presumably well acquainted with the subject, as inhabitants of the district in the one case, or relations within certain limits in the other; such also as the proof of possession by entries of deceased stewards, or receivers charging themselves, or of facts of a public nature by public documents; within none of which exceptions is it contended that the present case can be classed.

That the three letters were each of them written by the persons whose names they bear, and sent at some time before they were found to the testator's house, no doubt are *facts;* and these facts are proved on oath, and the letters are without doubt admissible in an issue on which the fact of sending such letters by those persons, and within that limit of time, is relevant to the matter in dispute; as, for instance, on a feigned issue to try the question whether such letters were sent to the testator's house, or on any issue in which it is a material question whether such letters, or any of them, had been sent. Verbal declarations of the same parties are also *facts*, and, in like manner, admissible under the same circumstances, and so would letters or declarations to third persons, upon the like supposition.

But the question is, whether the contents of these letters are evidence of the *fact to be proved upon this issue*, that is, the actual existence of the qualities which the testator in those letters by implication is stated to possess; and those letters may be considered in this respect to be upon the same footing, as if they had contained a direct and positive statement that he was competent. For this purpose they are mere hearsay evidence, statements of the writers, not on oath, of the truth of the matter in question; with this addition, that they have acted upon the statements on the faith of their being true, by their sending the letters to the testator. That the so acting cannot give a sufficient sanction for the truth of the statements is perfectly plain, for it is clear that if the same statements had been made by parol, or in writing to a third person, that would have been insufficient, and this is conceded by the learned counsel for the plaintiff in error; yet in both cases there has been an acting on the belief of the truth, by making the statement or writing, and sending the letter to a third person, and what difference can it possibly make that this is an acting of the same nature by writing and sending a letter to the testator? It is admitted, and most properly, that you have no right to use in evidence the fact of writing and sending a letter to a third person containing a statement of competence, on the ground that it affords an inference that such an act would not have been done, unless the statement was true, or believed to be true; although such an inference, no doubt, would be raised in the conduct of the ordinary affairs of life, if the statement were made by a man of veracity; but it cannot be raised in judicial inquiry, and if such an argument were admissible, it would lead to the indiscriminate admission of hearsay evidence of all manner of facts.

Further, it is clear that an acting to a much greater extent and degree, upon such statements to a third person, would not make the statement admissible. For example, if a wager to a large amount had been made as to the matter in issue by two third persons, the payment of that wager, however large the sum, would not be admissible to prove the truth of the matter in

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issue—you would not have had any right to present it to the jury as raising an inference of the truth of the fact, on the ground that otherwise the bet would not have been paid; it is, after all, nothing but the *mere statement* of that fact, with strong evidence of the belief of it by the party making it. Could it make any difference that the wager was between a third person and one of the parties to the suit? Certainly not. The payment by other underwriters on the same policy to the plaintiff could not be given in evidence to prove that the subject insured has been lost; yet there is an act done, a payment strongly attesting the truth of the statement which it implies, that there has been a loss. To illustrate this point still further, let us suppose a third person had bet a wager with Mr. *Marsden* that he could not solve some mathematical problem, the solution of which required a high degree of capacity; would payment of that wager to Mr. *Marsden's* banker be admissible evidence that he possessed that capacity? The answer is certain—it would not. It would be evidence of the fact of competence given by a third party not on oath. Let us suppose the parties who wrote these letters to have stated the matter therein contained, that is, their knowledge of his personal qualities and capacity for business on oath before a magistrate, or in some judicial proceeding to which the plaintiff and defendant were not parties. No one could contend that such statement would be admissible on this issue, and yet there would have been an act done on the faith of the statement being true, and a very solemn one, which would raise in the ordinary conduct of affairs a strong belief in the truth of the statement, if the writers were faithworthy. The acting in this case is of much less importance, and certainly is not equal to the sanction of an extra-judicial oath. Many other instances of a similar nature, by way of illustration, were suggested by the learned counsel for the defendant in error, which, on the most cursory consideration, any one would at once declare to be inadmissible in evidence: others were supposed on the part of the plaintiff in error, which, at first sight, have the appearance of being mere facts, and therefore admissible; though, on further consideration, they are open to precisely the same objection. Of the first description are the supposed cases of a letter by a third person to any one demanding a debt, which may be said to be a treatment of him, *as a debtor*, being offered as proof that the debt was really due; a note, congratulating him on his high state of bodily vigour, being proposed as evidence of his being in good health; both of which are manifestly at first sight objectionable. To the latter class belong the supposed conduct of the family or relations of a testator taking the same precautions in his absence as if he were a lunatic: his election, in his absence, to some high and responsible office; the conduct of a physician who permitted a will to be executed by a sick testator; the conduct of a deceased captain on a question of sea-worthiness, who, after examining every part of the vessel, embarked in it with his family;—all these, when deliberately considered, are, with reference to the matter in issue in each case, mere instances of hearsay evidence,—mere statements, not on oath, but implied in, or vouched by the actual conduct of persons by whose acts the litigant parties are not to be bound.

The conclusion to which I have arrived is, that proof of a particular fact which is not of itself a matter in issue, but which is relevant only as implying a statement or opinion of a third person upon the matter in issue, is inad-

missible in all cases where such a statement or opinion, not on oath, would be of itself inadmissible, and therefore in this case the letters which are offered only to prove the competence of the testator, that is, the truth of the implied statements therein contained, were properly rejected, as the mere statement or opinion of the writer would certainly have been inadmissible. It is true that evidence of this description has been received in the Ecclesiastical Courts, but their rules of evidence are not the same in all respects as ours: some greater laxity may be permitted in a Court, which adjudicates both on the law and on the facts, and may be more safely trusted with the consideration of such evidence than a jury; and I would observe also, that in no instance has the propriety of the reception of it, even in the spiritual courts, been confirmed by the Court of Delegates. I do not think, therefore, that we are bound by the authority of the cases referred to in the Ecclesiastical Courts.

The next question is, whether there is any evidence of an act done with reference to these three letters, or any of them, to render their contents admissible, by way of explaining that act. I am clearly of opinion that none of them were admissible on this ground.

The facts stated on the face of the bill of exceptions relative to this point are, that the three letters were found open, and with the seals broken, with other letters, *after the death* of Mr. *Marsden*, in a *cupboard* under his bookcase in his private room, some of which other letters were indorsed in the handwriting of Mr. *Marsden*, and some answered by him, (which letters, so indorsed and answered, were received in evidence). The first of the three letters was written by one *Charles Tatham*, long since deceased, who was cousin of the testator, and then in America; it bore date the 12th of October, 1784. There was a draft of a letter from Mr. *Marsden*, in his handwriting, amongst the papers so found, dated June 1st, 1787, but it contained no reference whatever to Mr. *Tatham's* letter, or any of the matters mentioned in it. The second purported to bear date in 1786, was in the handwriting of the then vicar of Lancaster, addressed to Mr. *Marsden*, and requesting him to order his attorney to wait on some persons therein named on matters of business; the letter was indorsed in the handwriting of Mr. *Marsden's* then attorney, who died about 1801. The third letter was in the handwriting of the curate of the place, long since also deceased.

The first remark to be made on this statement, and which applies to all the three letters, is, that the place in which they were found is not proved to be that where the testator was in the habit, in his lifetime, of keeping the letters addressed to him, which he had opened and read, or any of his papers; nor is it stated that they were found *immediately after* the testator's death. The time and place of finding, therefore, afforded no evidence that the letters were placed there by the testator in his lifetime; so far as relates to the place and time of finding, the letters might have been put there after the testator's death. But passing by that circumstance, let us suppose that they were found immediately on the testator's decease, so as to exclude any inference that they were placed there after the testator's death. I cannot see what evidence there is that they were opened, *read*, and placed there by the *testator*, which would be acts done by him, and would render the contents admissible, because that circumstance would prove capacity to the limited extent of his ability, to open, to read the letters, and put them by. In no other way could the contents be admissible. Now there is no *direct* evidence,

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that is, evidence that the testator was seen to open, read, and deposit the letters in that place; and therefore the only question is, whether those facts may be *inferred* from the facts proved, that is, from the facts that the letters were found *instantly* after the testator's death, opened, and with the seals broken, in the place with other papers recognised by him. This would be a very proper inference from those facts, on the presumption that the testator had capacity to *transact business of that nature;* and if there was a cause relative to the testator's property, in which his capacity and competence were not in dispute, and an issue raised thereon, whether he had personal notice of the contents of any of the letters so found, the fact of finding them at the time and place supposed would raise the inference of such notice; but that would be founded on the presumption, that primâ facie every one is of competent understanding until the contrary is proved, and that a competent man, in that situation of life, would be able to read and understand such letters. But in this case the evidence is admissible only for the purpose of proving capacity, and for no other purpose whatever; and it seems to me that the argument in favour of admitting the contents of the letters to be read as evidence, proceeds on a fallacy. It is a clear instance of the petitio principii, of reasoning in a circle; it assumes the testator to be competent, in order to raise an inference that he was cognisant of the contents of the letters, and then makes use of the presumed cognisance of the contents of the letters, to prove that he was competent. The reasoning proceeds thus:— because he had sufficient ability to do business, therefore it is to be inferred that he read and understood the letters; and because he read and understood the letters, therefore he is to be inferred to have been of sufficient ability to do business.

It is, indeed, said by the learned counsel for the plaintiff in error, that he makes no assumption either way; he neither assumes capacity nor incapacity, but only draws an inference from the facts of the letters being found open in the way described. But in reality, though he professes to make no such assumption, the inference cannot be drawn at all without making an implied assumption to that effect; for on what other ground can you infer from these facts that the *testator* opened, read, and placed the letters there? If he was utterly senseless and imbecile in mind and body, you could not infer that he did so; and it is only because a man capable of reading and doing business would naturally do such acts that you could infer that the testator did them; that is, upon a presumption of competence such inference may be drawn, but not otherwise. Nor can you use the inference of competence derived from *other facts* which appear upon the bill of exceptions to have been proved, to make *these* admissible, the only question being whether *these facts of themselves* do conduce to prove that competence.

The argument, therefore, that the facts proved raise an inference of competence seems to be clearly an assumption of the whole question.

This objection applies equally to the case of Mr. *Marton*'s letter, though the fallacy in that case is somewhat more disguised. The fact of the attorney's indorsement being on the letter, is clear proof that *he* had such possession of it in his lifetime as to be able to make an indorsement; but that circumstance does not advance the case, in reality, a step further. The inference that Mr. *Marsden* read the letter, and finding a request to refer it to his attorney did so, and delivered the letter to him, and therefore that he was

to that extent competent, (which is the only way in which the evidence is relevant to the issue) is altogether founded on the presumption of that competence, and is just as much an instance of the petitio principii as the other to which I have already referred. You assume his capacity to understand the contents of the letter and act upon them like a man of business, and infer from that, he did understand the contents and act upon them; and then you use the facts so inferred as proof of that capacity. Unless you assume the testator's competence, the only point to be proved, the fact given in evidence is not relative to the issue. It is proved that the letter was addressed to the testator, was *opened* by some one, and in the attorney's hands; if this was done by the testator it is some little evidence of capacity; but unless you assume the testator's capacity, the only matter to be proved, you cannot draw an inference that it was done by him.

The first letter, that of Mr. *Charles Tatham*, stands precisely on the same footing in this respect with the others, so far as relates to its being with the testator's papers, open and with the seal broken, and to the inference sought to be derived therefrom, that it was opened and read by the testator. It is impossible to contend that the copy of Mr. *Marsden*'s letter to him makes the contents of his letter admissible by way of explanation, as it is no answer to it, nor contains any reference whatever to its contents, nor to the subject of it. The first letter cannot possibly explain the contents or meaning of the second, nor can the fact of Mr. *Marsden*'s writing that letter raise any inference that he was cognisant of the contents of the first. So far as the fact of writing that letter proves competence, the evidence was admissible and admitted.

I am of opinion, therefore, that the contents of none of the letters were admissible, and that our judgment ought to be for the defendant in error.

PARK, J.—It is with great reluctance and concern that I give my opinion in the present case; because differing, as I unfortunately do, from three of my very learned brothers, who have now delivered their judgments, I cannot but feel great doubts about the validity of my own opinion. Still it is my duty to declare my conscientious judgment; and I have at least the satisfaction of not being quite alone in the opinion I give; concurring, as I do, entirely with my learned brother *Gurney*, and *partly* supported, as I believe I shall be, by the very learned person who is to follow me. I am happy, too, to believe that there is no difference amongst us as to the principle or rule of law which is to govern this case; the difference that arises is upon the application of the facts to that principle.

The question is, whether the three letters mentioned in the bill of exceptions, or any, or either of them, ought to have been received in evidence by my learned brother at the trial?

No such letters were much pressed upon me at the first trial, though I believe they were tendered; but upon the second trial, before my brother *Gurney*, he rejected them, or similar letters, and a bill of exceptions was tendered to him upon that ground. That point came to be argued in this Court with another exception, and as all the judges agreed in favour of the plaintiff in error upon the second exception, it was not necessary then to decide the first, the judges then present not being unanimous, as I lament they are not unanimous now. The point now, as it was argued formerly,

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was as to the admissibility of certain letters written to the testator by respectable persons, now deceased, well acquainted with the testator, which ought to be laid before the jury, to shew in what manner the testator was *treated* by the letter writers, and such treatment ought to be shewn in order to disprove his alleged imbecility. I adopt the rule laid down in the King's Bench (6th *Nevile & Manning*, 146) that it ought to appear that some act—that Court admitting that the least act done by the testator would be sufficient—that some act done by the testator with reference to the letters would have made them evidence, for such act could not properly be explained without reference to them; and, if received, no rule of law could have prevented their full effect from being produced on the minds of the jury. To all that I accede, and I insist that some act *was done by him*, as to all the three letters in controversy, but most assuredly as to *one* of them.

In the outset it must be remarked, that the date of these letters is very remote, one of them being fifty-three years old, another fifty-one, and another near forty years old. I am not prepared to say, if these letters had been very modern and the supposed insanity had recently taken place, there might not have been more ground of suspicion; indeed, probably modern letters could not be at all received, especially if the writers of them were alive. But in this case the party now appealed against denied the testator's competency, alleging his entire natural incapacity *a nativitate*. This I own seems to me opening so wide a space for investigation, admitting, on the one hand, treatment of persons who considered him weak and an idiot, and I think, on the other, there ought to be admitted the expressions he used and his manner of conducting himself, and also the manner in which he was received, treated, and dealt with by respectable and honourable persons, at a time long before, years before, nay, nearly half a century before any question arose respecting a will, excluding thereby all possibility of fraud or collusion. Upon this subject the passage referred to from Mr. *Starkie*'s invaluable work, and which is well supported by the authority of cases, is not inapplicable to the present discussion. "It seems to follow," says the learned author, "that all the surrounding facts of the transaction, or, as they are usually termed, the res gestæ, may be submitted to a jury, provided they can be established by *competent means*, and afford any fair presumption or inference as to the question in dispute; for so frequent is the failure of evidence from accident or design, and so great is the temptation to the concealment of truth and misrepresentation of facts, that no competent means of ascertaining the truth can or ought to be neglected by which an individual would be governed, and on which he would act with a view to his own concerns in ordinary life."

Taking this then to be a sensible rule, let us see whether *competent means* have not been rejected as evidence to shew the opinion of all those honourable persons by whom he was surrounded, and who treated him as a sane, and though not a bright, yet a man *competent* to the *ordinary concerns of life*. It seems to me impossible to suppose that persons of character and intelligence, who were well acquainted with him, wrote *such* letters to him as they would not have addressed to any but a person whom they supposed to be of a sound mind, and this covering the period in which he is said to be unfit for associating with the general class of men with whom his station in life would otherwise entitle him to associate.

The first material letter which was rejected was one from *Charles Tatham*,

the testator's cousin, dated from America as long ago as the year 1784, the contents of which have been much commented upon. (His lordship here read the letter.) This letter was marked, as the bill of exceptions states, with the London post mark, as a ship-letter, and was in the handwriting of *Charles Tatham.*

Let it be observed, and I think it a most material circumstance, that amongst the papers of the testator was found, as appears by the bill, a draft or copy of a letter from the testator to the said *Charles Tatham* in the handwriting of the testator, which, though not an answer to the former, being written three years after, shews that a correspondence was going on between these two cousins. (His lordship then read the copy of the letter from Mr. *Marsden* to *Charles Tatham.*)

This letter, I think, is an important one, because it seems to me impossible that any man could read this letter, written by Mr. *Marsden* himself, a period of fifty years from the time I am making these observations, and suppose that a man could have written such a letter as this who had not some intelligence about him. In this letter he refers to a letter he had written before to his cousin. It is a sort of gossiping letter, giving him an account of his friends in England, that one of his friends is going to be married, and that his aunt was likely to die. It shews that he had an intelligent mind, in my humble judgment, and if this be not an acting between correspondents I know not what is.

For the present I pass over Mr. *Marton*'s letter, the vicar of Lancaster, though anterior in point of date to the one I am about to mention, namely, that of Mr. *Ellershaw*, a clergyman of the Church of England. This letter is dated in 1799, and I cannot bring my mind to believe that any man of that sacred function could write such a letter, expressive of such sentiments of the piety and benevolence of the person to whom it was addressed, by one who for years had been his spiritual pastor and guide, and who being about to quit, or having actually quitted, his charge, must have been the vilest hypocrite to write such a letter without one secular motive to serve in doing so.

But what are we to say to the rejection of the letter of the Rev. Mr. *Marton*, dated as long ago as 1786. He lived nine miles, or more, from the testator. He was vicar of Lancaster; the last man in the world, we should suppose, to write to an idiot; and he writes a letter and sends it to Mr. *Marsden* upon *business*, and on business merely requesting him to attend, or order his attorney to attend, a meeting, and propose some terms of agreement.

Now Mr. *Marsden*'s attorney, Mr. *Barrow*, who was afterwards a barrister, lived at Lancaster, some miles from Wennington, where Mr. *Marsden* then lived, and we find Mr. *Barrow*'s indorsement upon it; so that he must have gone to Mr. *Marsden* on being sent for, or Mr. *Marsden* to him, to do the needful. But it is doubted by the defendant in error, whether Mr. *Marsden* ever read it. The date of the letter is the 20th of May, and that is the *same* date in the indorsement by Mr. *Barrow:* and as the letter is directed to Mr. *Marsden* at Wennington, and Mr. *Barrow* lived some miles off, at Lancaster, it must have been sent that very day to Mr. *Barrow;* and why are we to suppose that some person at that distant period, half a century from this time, opened that letter and sent it to Mr. *Barrow* unknown to Mr. *Marsden,*

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and foisted it amongst other papers to furnish evidence, half a century afterwards, to establish a will which did not then exist, and did not exist till 1822, nor the codicil till 1825? If these are not acts of recognition as laid down by the Court of King's Bench, I know not what other acts can be so considered.

But it is said the testator has done no act upon it. I deny that; first of all, I have mentioned the length of time since which these letters were written; two of them above fifty years ago, one of them nearly forty years since. Where were they found? With *other papers* in a *cupboard* under his *bookcase* in his *private* room, and the letters had all been opened. It is not stated that the cupboard was open to all the world, or that his *private* room (for so the bill of exceptions calls it) was accessible to all intruders; it must be considered as his place of deposit. The seals of all were broken; and one cannot believe but that they were read and laid by. An idiot never would have done so, he would have thrown them aside. I have heard it stated, and I believe it to be so, that such letters as these would have been received in the Ecclesiastical Courts, but I cannot get at sufficient evidence to enable me to found my opinion upon their practice, and therefore I do not. It has been said indeed, that even if it were so, their rules of evidence are different from ours. It may be so, but if so, I lament that in the same country, though the rules of practice and form in different courts may differ, the substantial rules of evidence should vary. Here, however, I have declared my own opinion upon the rules of our own law, but with great doubt and hesitation, on account of the opinion of those opposed to me; and it must be recollected, that all fraud is excluded. I also lament, with deep concern, that this sort of evidence has been pressed, because, having been the first common law judge to try this cause, about six or seven years ago, when such evidence, I believe, was tendered to me, though not pressed, it does appear to me that the admission or non-admission of such letters as these was a feather in the scale of justice. However, I am bound to declare in my serious and conscientious opinion, that such letters, under the circumstances, should have been received. But I must say, humbly, that the rejection of the letters has been supported upon a variety of conjectures and suppositions wholly unfounded, imputing fraud to persons who hardly existed at the time those letters were written; and therefore I am of opinion the judgment of the Court of King's Bench ought to be reversed.

TINDAL, C. J.—The question raised upon this bill of exceptions is, whether three letters therein set forth, or any of them, ought, under the circumstances stated in the bill of exceptions, to have been held, by the learned judge who tried the cause, to be admissible as evidence before the jury on a question of the competence of the party to whom such letters were addressed; and the conclusion at which my mind has arrived is, that one of those letters, namely, that which was written by Mr. *Oliver Marton*, the vicar of Lancaster, ought to have been held admissible, and its contents to have been submitted to the consideration of the jury; but that the other two letters were properly rejected. The question to be determined by the jury was, whether or not the testator, *John Marsden*, was, and had been from the time he attained his full age in 1779, and down to, and at the time of his making his will and codicil,

in the years 1822 and 1825, respectively, a person of sane mind and memory, capable of making a will?

In order to determine that question, I conceive all that was said, written, or done by the testator himself, at any time during such period, was the most direct and the best evidence to ascertain the state of his understanding; and that the next in degree, because intimately connected with it, would be all that was said to him, written to him, and done to him, during the same period, by his friends and others who had access to him; provided always, that what was so said, written, or done to him by others, is shewn to have come home to his actual knowledge, but I consider this condition to be indispensable, as to the admissibility of this second class of evidence; for as to what was said by others, but not heard by the party whose understanding is the subject-matter of inquiry, or written by others, but which never reached him; or done by others, but never known by him to have been done; it appears to me that such speaking, or such writing, or such acting, can amount to no more than an expression of the opinion of the speaker, or the writer, or the actor, and that such opinion, not having been given upon oath, and not being subjected to cross-examination, as to the grounds upon which it was originally formed or continued, cannot upon that account be deemed admissible in evidence. I cannot, therefore, accede to the position which has been contended for by the learned counsel on the part of the plaintiff in error, that mere treatment of the party by others, without or beyond the reach of the knowledge of the party himself, or, as it was sometimes expressed, *conduct of others towards him*, although not amounting to conduct to himself, can form a legitimate or admissible species of evidence; evidence of that description may have been held admissible in questions relating to the status of mind or competency of a testator, before ecclesiastical tribunals; those counts perhaps, and not improperly, may have allowed evidence of the manner in which a person has been treated by his friends and others, without inquiring whether those modes of treatment came home to the understanding of the testator. But in an ecclesiastical court the same persons are judges both of the law and the fact; and their experience and sagacity may be sufficient to prevent any injurious consequences from a class of evidence which approaches so closely to, if it is not in fact, mere opinion of the witness, by giving such testimony no more weight than it really deserves. But our rules of evidence are calculated for trials before popular tribunals, and one of the first objects of the law of evidence in those courts is to exclude the admission of any evidence which may by possibility mislead the understanding of the jury.

I therefore consider such treatment only of a person by his friends or others to be admissible in evidence upon a question concerning his competency, as appears to have come home to his understanding, and upon which he has been shewn in some degree to have acted; for, after all, it is not the treatment itself which is of any value, but the mode in which the party conducts himself when such treatment takes place. It is not what the third person does, or says, or writes, which furnishes of itself any indication of the state of mind of the party respecting whom the inquiry is made, but what such party himself does, or says, or writes, or how he conducts or bears himself on the occasion; for even his refusal to act, or his silence, may, in some instances, and on some occasions, furnish evidence as strong upon the state of his mind, and speak as loudly and intelligibly as any act or answer, however direct;

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and this I take to be in effect the rule laid down by the Court of King's Bench upon a motion for a new trial in this very cause, the decision of which is reported in the 6th *Nevile & Manning*, 132, and with which I entirely concur; and I cannot frame to myself any other general rule that is equally intelligible, and capable of application to the infinitely various modes and questions of evidence which must necessarily arise, and present themselves on such a subject of inquiry.

The question, therefore, I consider to be reduced to this, whether—taking into consideration the several circumstances stated in the bill of exceptions as to the finding of these letters, and the evidence contained therein of the dealing with these letters, or their contents, by the testator in his lifetime—the judge was right in rejecting all of them as inadmissible.

In considering this question, the first thing to be observed is, we have no right to import into the case any suspicion of fraud, either with respect to the place in which these letters were found deposited, the time at which they were first discovered, or the facts attending their discovery; fraud of any kind is not to be surmised, but must be expressly found; and if the reasoning upon the facts stated in the bill of exceptions is to be allowed in any manner to receive a bias or colouring from a suspicion of fraud, where the precise facts to support such fraud are not stated, the minds of no two individuals can expect to arrive at the same result from the same premises. The facts attending the finding of these letters might undoubtedly have been stated with more precision and accuracy; but I take the result of the statement to be, that these letters were found in a place where the testator usually kept his letters and papers in his lifetime, for they were found with many letters addressed to him by various persons, of dates extending over a considerable period of time, at the very least from 1784 to 1799, and with other papers of the testator, so that the reasonable inference is, that this was his usual place of deposit of letters and papers, and a cupboard under his bookcase, in his private room, being a place not unusual for the safe custody of letters and papers. As to *the time* at which they were discovered the bill of exceptions is silent; the reasonable inference therefore is, that they were found at the time when such matters, according to the usual course of business and ordinary experience, are searched for and found; that is, at such short and reasonable time after the death of the testator as is sufficient to arm the personal representative with an authority to search and examine the papers of the deceased.

Now, taking the three letters into consideration, and applying to them that test before adverted to, namely, whether there is sufficient evidence to shew that they came to the hands and knowledge of the testator, or that there was any dealing with them on his part as with letters that actually came to his hands. I think with respect to the first, i. e. the letter of the date of the 12th of October, 1784, the learned judge was right in holding that it was not admissible. It is stated in the bill of exceptions, that to some of the letters answers had been written and sent, of which copies had been preserved, in his own handwriting, and that others were indorsed by him in his handwriting, by which I understand that the name of the writer, or the date of the letter, or both, were put upon it. But that as to the letter in question it had neither of these *indiciæ* from which any inference could be drawn that it had been actually submitted to his mind, or that he had ever read it at all. All that appeared was, that it was open and that the seal was

broken; and although it appears that another letter was afterwards sent to him from the same relative who wrote the letter now under discussion, to which he returned an answer of the date of the 1st of June, 1787, yet this subsequent correspondence does not impress my mind with the conviction that the particular letter in question must necessarily have come to his knowledge, or that he exercised his understanding upon it. The same observation applies still more strongly to the letter from Mr. *Ellershaw* of the date of the 3rd of October, 1789, as it wants even the confirmation and support arising from the subsequent correspondence between the parties which the first letter possesses.

But with respect to the letter dated the 20th of May, 1786, and written by Mr. *Oliver Marton* to the testator, I think there are circumstances, extrinsic of the letter itself, which shew that the letter had come to the testator's knowledge, and that he had exercised so much understanding upon it as was sufficient to have authorized its admission to the jury, and that it ought accordingly to have been submitted to their consideration. This letter was addressed to the testator at Wennington, where he resided at the date of the letter. It was found amongst the other letters and papers, after the testator's decease, at Hornby Castle, the place where he resided at his death. So far as the evidence goes the letter must be taken to have been brought there either by himself, or by his orders, with his other letters, for no ground is laid in the bill of exceptions for the inference that it was brought there by any indirect means, or for any indirect purpose. The letter recommends that the attorney of Mr. *Marsden* should wait on Mr. *Atkinson* or Mr. *Watkinson* respecting a dispute mentioned therein, and that a case should be settled by Mr. *Marsden*'s and their attornies. This letter is found in the place and at the time before commented upon. It is found open and with the seal broken, and indorsed in the handwriting of Mr. *James Barrow*, who was at that time his attorney, and with the date and name of the writer.

The letter, therefore, must have got into the hands of the attorney of the testator, the very person who, from its contents, was not only the most proper person, but the only person in whose hands it should be placed.

The question is, whether the circumstances stated in the bill of exceptions shew a reasonable ground for the judge to be satisfied that this letter must have reached the attorney's hands through the instrumentality in any way of the testator, whether in any way he had acted upon it? For if there was reasonable ground for such opinion, then the letter should not have been withheld from, but should have been submitted to, the jury, as one out of the numerous facts upon which their determination should be founded.

Now it appears to me, as I have before observed, that in the determination of this point, all suspicion or surmise of fraud is to be carefully kept out of view, and the several facts stated in the bill of exceptions are to be treated as if they occurred in the course of a real and genuine transaction. The bill of exceptions states no fraud, because none appeared at the trial, and consequently the judge who is to determine upon the admissibility of the evidence is not at liberty to presume any. The first point to be observed is, that the letter gets to Mr. *Marsden*, the testator, for to him it is addressed, at Wennington, where he then lived, and with his other letters and papers it is found after his death, open, and with the seal broken.

In the next place, it appears that it did, in some way or other, come into

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the hands of Mr. *James Barrow*, the attorney of Mr. *Marsden*, the very person to whose consideration it was to be submitted, according to the directions of the letter itself.

This is the inference that is naturally to be drawn from the circumstance of the indorsement having been made by him, for upon what ground can it be said that the indorsement is found to be made upon this letter in the handwriting of Mr. *Barrow*, and the indorsement on all the other letters (such as are indorsed) in the handwriting of Mr. *Marsden*, except that this particular letter was, by the subject-matter of it, required to come to, or to be put into the hands of Mr. *Barrow*—a circumstance which did not apply to any of the others. Now this letter could only get into the hands of Mr. *Barrow* (without the supposition of fraud, which is always to be excluded where none is suggested,) in two ways, either by the sending of the letter by Mr. *Marsden* to Mr. *Barrow*, and his returning it back again, or by Mr. *Barrow* taking it with the assent of Mr. *Marsden*, and again returning it to Mr. *Marsden*. In any other way there must have been contrivance or unfair dealings with the letter, on the part of Mr. *Barrow* or some other persons; and if the letter was forwarded by either of those means, it denotes a dealing with the letter by Mr. *Marsden*, which makes it admissible evidence for the jury. The objection against this mode of reasoning appears to be raised, that it is in the nature of a petitio principii, or an assumption of the very thing which is to be proved, viz. the rationality of Mr. *Marsden*; but I cannot feel the full weight of this objection. The judge who presides at the trial, by admitting this evidence, is not determining, nor has he any right to determine the question of the competency of the testator. That is the question which the jury are to decide after the termination of a long course of conflicting evidence. All the judge has to determine is, whether a particular piece of evidence is, at a particular period of the cause, admissible for the consideration of the jury as the matter then stands; that is, with respect to this letter, whether there is reasonable evidence to satisfy his mind that it came to the testator, and that he exercised some act of judgment, or understanding, though in ever so small a degree, upon it; and as it strikes my mind that the evidence fully justifies such inference, I think this letter ought to have been admitted.

I cannot, in conclusion, but express my regret that the production of these letters was made so strong a point at the trial of the cause, for either their admission or their rejection must endanger the verdict, whilst at the same time it is obvious that their production or their absence would have very little effect indeed upon the minds of the jury. But as the parties have thought proper to raise the question, I am bound to give my opinion as it is formed, upon the facts stated in the bill of exceptions; and I think upon these facts the inference is, that the letter of Mr. *Marton* reached the testator, to whom it was addressed,—that it was acted upon by him,—and consequently, that it ought not to have been rejected at the trial; and on this ground I think the judgment ought to be that of a venire de novo.

Judgment affirmed (*a*).

(*a*) This case was twice argued in consequence of the resignation of *Gaselee*, J.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF QUEEN'S BENCH,

AND ON WRITS OF ERROR FROM THAT COURT TO THE

EXCHEQUER CHAMBER,

AND IN THE

BAIL COURT,

IN MICHAELMAS TERM, I VICTORIA, 1837.

CURTIS *v.* The Marquis of HEADFORT.

Bail Court.

In assumpsit on a banker's cheque, a plea that it was given as a security for a gambling debt, de injuriâ is a good replication on general demurrer.

THIS was an action of assumpsit on a banker's cheque, dated on the 10th of November, 1835, drawn by the defendant and delivered to *E. Bond,* and transferred by him to the plaintiff. The plea stated, that before the 31st of August, 1835 (when the statute 5 & 6 *W.* 4, c. 41, passed) the cheque was given by the defendant to secure a gambling debt due to *E. Bond,* of which the plaintiff had notice. To this there was a replication of de injuriâ, and the defendant demurred generally. A rule having been obtained to shew cause why this demurrer should not be set aside as frivolous, and why the plaintiff should not be at liberty to sign judgment as for want of a plea:

C. Cooper shewed cause.—The replication in this case is bad. Previous to the late statute 5 & 6 *W.* 4, c. 41, this cheque was void by the statute 9 *Ann.* c. 14; and being void from the very making, the effect of the plea was to deny altogether the contract stated in the declaration. The plea being in total denial of the right of action, is not a plea in excuse or in confession and avoidance; and, consequently, the replication of de injuriâ is a replication which is bad on general demurrer, as it is necessary that there should be some admission of the promise to warrant that replication. *Crogate*'s case (*a*) is an authority to shew that as this plea is not a mere excuse, the replication de injuriâ is improper. In the case of *Fursdon* v. *Weeks* (*b*) a replication of de injuriâ was held bad on general demurrer. That case was considered in the case of *Hooker* v. *Nye* (*c*), where it was decided that de injuriâ was a bad plea in substance.—[*Coleridge,* J.—That is a distinguishable case, as there the

(*a*) 8 Rep. 66. (*b*) 3 Lev. 65. (*c*) 4 Tyr. 777; 2 Cr. Mees. & Ros. 258.

Bail Court.

CURTIS v. Marquis of HEADFORT.

plea set up a claim of interest in land. That was set up in the affirmative, and it was necessary for the plaintiff to answer it.]—In *Griffin* v. *Yates* (*a*) and *Isaac* v. *Farrar* (*b*) it has been held that the replication of de injuriâ is good in assumpsit; in those cases however the pleas were in excuse of the contract in the declaration, and confessed and avoided the alleged promise, but there is no case where such a replication has been held good in which the plea directly denied the promise in the first instance.—[*Coleridge*, J.—The case of *Noel* v. *Rich* (*c*) is, I think, exactly like the present, and there the replication of de injuriâ was held good on general demurrer.]—In that case the plea shewed that the bill of exchange was good in the first instance, but that the plaintiff under the circumstances had no right to sue on it. In the present case the plea shews the cheque to have been void from the very first to all intents and purposes whatsoever (*d*), and therefore the replication of de injuriâ is bad in substance. In the case of *Solly* v. *Neish* (*e*) it was held, that to a plea in assumpsit, which was a denial of the promise, and not a mere matter of excuse, de injuriâ was a bad replication.—[*Coleridge*, J.—That was on special demurrer. It must be shewn here that this replication is bad on *general* demurrer.]—In *Whittaker* v. *Mason* (*f*) it was held, that de injuriâ was a bad replication in assumpsit, to a plea which did not admit the contract and offer an excuse for not performing it. In *Crisp* v. *Griffiths* (*g*) such a replication was again held to be bad; and though that was on special demurrer, the distinction was not taken between special and general demurrer. It is sufficient on this rule that it be shewn that the demurrer is not *frivolous*, which it is submitted has been done, and consequently the rule must be discharged.

Platt, contrâ, was stopped by the Court.

COLERIDGE, J.—Feeling, as I do, that this case has been most ably investigated, and being bound also to remember the state of the special paper, and of the delay that would accrue were I not to decide it; and having moreover a very clear opinion on the point, I feel that I am called on to decide it. The question is not whether the replication is multifarious, nor whether there is any other objection in point of form; the only question is, whether the replication is substantially bad; that is, whether, under any circumstances, this replication to this plea can be replied. A few years ago it would not have been held a good replication; several late cases have however decided that it may be pleaded in assumpsit; but then it is said, that there must be some admission of the original promise in order to authorise it. I do not however see the good sense of that position. It does not depend on the doctrine laid down in *Crogate*'s case, but on the misunderstanding of that doctrine. That case determined that this replication was good where the plea consisted merely of matter of excuse, and of no matter of interest whatsoever (*h*). I do not understand the distinction which Mr. *Cooper* insisted

(*a*) 1 Hodges, 387; 2 Bing. N. R. 579; 4 Dowl. P. C. 647; 2 Scott, 845.
(*b*) 1 Gale, 385; 4 Dowl. P. C. 750; 1 Mees. & Wels. 65.
(*c*) 1 Gale, 225; 2 Cr. Mees. & Ros. 360; 4 Dowl. P. C. 228.
(*d*) But see *Edwards* v. *Dick*, 4 B. & Ald. 212.
(*e*) 1 Gale, 227; 4 Dowl. P. C. 248; 2 Cr. M. & Ros. 355.
(*f*) 2 Bing. N. R. 359; 1 Hodges, 319.
(*g*) 1 Gale, 106; 3 Dowl. P. C. 752; 2 Cr. Mees. & Ros. 159.
(*h*) See *Burdons* v. *Selby*, in error, 9 Bing. 756; 3 Tyr. 430; 1 Cr. & Mees. 500; 3 B. & Adol. 2.

on when he said, that in assumpsit this replication might be good in certain cases, but could not be so in this case. That argument cannot be founded on *Crogate's* case. The rule there laid down, when applied to assumpsit, falls to the ground, and I think that I am warranted in saying so by the case of *Noel* v. *Rich*, which is precisely similar to the present. The only distinction which Mr. *Cooper* makes is this, that this cheque was bad in its inception; whereas in that case the bill of exchange was good in the first instance, but there was no right of action in the parties who then sued on it. That, I think, is a distinction without a difference. The Court in that case said, that de injuriâ was substantially a good replication. The plea denied that there was any promise as between *Noel* and *Rich*, as stated in the declaration, yet it was held, that the replication of de injuriâ was good, and that if there was any objection at all, it was in point of form only. Lord *Abinger* there says, "I am also inclined to think that the replication is good, and that the objection made to it is matter of form. Formerly, under the general issue, most defences might be given in evidence; but, since the Court promulgated the general rule for the purpose of simplifying trials at nisi prius, that all defences must be pleaded, the general issue now only puts in issue the making of the promise; and in actions on bills of exchange, there is, strictly speaking, no general issue; but if the promise has been broken, the defendant must plead his defence specially. If the Court is right in throwing the burthen of proof on the defendant, the plaintiff, by his replication, certainly does so. He in fact says that he denies the cause which the defendant alleges he had for breaking the promise laid in the declaration." That is all that is done in this case; the defendant has set out facts which make a clear defence, and the plaintiff says those facts do not exist. Why may not he do that? We have nothing now to do with the multifariousness of the replication. Again, *Alderson*, B. says, "It appears to me that the replication is good. The defendant says that the plaintiff has no right to maintain his action for the cause stated in the plea. The plaintiff, in reply, alleges that the cause stated in the plea is not true. Whether in point of form this replication is right or not, is a different question." That case, therefore, seems to me a direct authority in principle, and also to be on all forms with the present, and therefore I think this replication is good on general demurrer (*a*).

Rule absolute.

(*a*) See *Parker* v. *Riley*, 1 Horn. & Hurl. 5; 3 Mees. & Wels. 230, in which this case (which was decided in the previous Trinity Term) was cited.

Ex parte TOMKINS.

WHATELEY, by the desire of the examiners of attornies, moved for an order directed to them, to examine Mr. *Tomkins* under the following circumstances. He was articled in October, 1832, for five years, to a person named *Davis*, in whose office he was employed until *Davis* died on the 24th of July, 1835. On the 10th of August following he was assigned over

An attorney having died, seventeen days elapsed before his articled clerk was assigned over to another attorney, to whom the clerk made up the time at the end of the five years:—*Held*, that he might be examined for admission as an attorney.

Bail Court.

Ex parte TOMKINS.

to another attorney, *George*, having been engaged the intervening seventeen days in the business of *Davis* in his office. He served in *George*'s office, and in that of his agents in London, to the end of the five years, and for more than seventeen days beyond that time. The question was, whether there had been a sufficient service under the articles, seventeen days having intervened between the death of his first master, and the time when he was assigned over.

LITTLEDALE, J.—You may take the order (*a*).

Ordered accordingly.

(*a*) See *In re Smith*, 1 Dow. & Ryl. 14; and *Ex parte Rowle*, 2 Chit. 61.

Ex parte SOUTHERN.

Where a person who had obtained the examiner's certificate for his admission as an attorney in Trinity term, did not apply to the Court for admission in that term, thinking that he was at liberty to be admitted in Michaelmas term, the Court refused him admission in Michaelmas term, but gave him leave to give fresh notices for the last day of Hilary term.

PETERSDORFF, on the 14th of November, moved for leave to admit a person as an attorney this term, under the following circumstances. He had given all the necessary notices previous to Easter term last for his admission in Trinity term. In Trinity term he passed his examination and obtained the examiners' certificate. He then made inquiry of an officer of the examiners when it would be necessary to be admitted, and was informed that he might be admitted any time before the end of the present term, and accordingly he did not apply to be admitted in Trinity term. Subsequently he discovered that he could not be admitted this term, his notices having been for admission in Trinity term, which rendered the present application necessary. It was submitted, that as the mistake was owing to a misconstruction by the officer of the rule H. T. 6 *W.* 4, s. 1 (*b*), which ordered that the *examiners' certificate* should be in force to the end of the term following the date thereof, the present application might be granted.

LITTLEDALE, J.—If I were to grant the application I should be dispensing with a rule of Court, which I cannot do. Application may be made to the full Court on the subject, or else I will grant leave for the applicant to give now the necessary notices for his admission on the last day of Hilary term (*c*).

Petersdorff elected to give fresh notices accordingly.

James, the same day, in a similar case, made an application for leave to give such notices for admission on the last day of Hilary term, which *Littledale*, J. granted.

(*b*) 1 Har. & Wol. 638. (*c*) See the next case.

Ex parte HILYARD.

A person who was prevented by illness from being admitted as an attorney in Trinity term, for which he had given notice, was allowed, in the course of the term, to give notices for his admission on the last day of Hilary term.

JAMES, on the last day but two of the term, moved, on the part of a person who was desirous of being admitted as an attorney of the Court, that he

might be allowed immediately to give the requisite notices for his admission on the last day of next Hilary term. He had given the requisite notices in proper time, for his admission last Trinity term, and had been examined for his admission in that term, and had obtained the examiners' certificate, but had been prevented by illness from being admitted.

Cur. adv. vult.

LITTLEDALE, J. the next day said, that perhaps it was a case in which some relaxation of the Rule of Court might be made, and gave leave that the notices should be given as requested (*a*).

Ordered accordingly.

(*a*) See *Ex parte Thompson*, 1 Will. Wol. & Hod. 33, and the previous case.

Ex parte WILLIS.

J. ADDISON, on the 17th of November, moved for leave that an attorney might give, nunc pro tunc, to the clerk of the Chief Justice, the copy of the affidavit required by the 6th Rule of H. T. 6 *Will.* 4 (*b*), previous to his re-admission on the last day of the present term. All the notices had been regularly given, and the copy of the affidavit ought to have been given before the commencement of the term, but had been inadvertently omitted to be done, and the mistake had only just been discovered.

Where the copy of the affidavit required by the 6th Rule of H. T. 6 *W.* 4, to be given to the clerk of the Chief Justice previous to the re-admission of an attorney, had been inadvertently omitted, the Court allowed it to be given nunc pro tunc.

LITTLEDALE, J.—Two-thirds of the term has now elapsed, and the object of the rule is, that the affidavit may be left with the clerk at the commencement of the term, so that an opportunity may be had of looking into the case; if it is omitted to be left as required, then no opportunity is given. However, the copy of the affidavit may be left now, but the clerk must give notice of it to the Chief Justice (*c*).

Ordered accordingly.

(*b*) 1 Har. & Wol. 639.

(*c*) See *Ex parte Collins*, 1 Will. Wol. & Dav. 73.

FEATHERSON *v.* WHATEMAN.

BALL opposed a motion to charge the defendant in execution, on the ground that the warrant of attorney on which the judgment had been obtained was usurious.

The Court will defer charging a defendant in execution on a judgment on a warrant of attorney until a motion is made for setting aside the judgment, on the ground of usury in the transaction.

Lumley, contrà, submitted that usury might be a good ground for a distinct motion, but was no ground for opposing the charging the defendant in execution, the judgment being perfectly regular.

LITTLEDALE, J.—It seems to me that this application must be suspended, so that Mr. *Ball* may have an opportunity of moving to set aside the judgment on the ground of usury. Unless there appears cause for setting aside the judgment on account of usury, I think that the plaintiff is entitled to charge the defendant in execution.

Bail Court.

FEATHERSON v. WHATEMAN.

Ball then moved to set aside the judgment, and to have the warrant of attorney delivered up to be cancelled, but it not appearing that there was usury in the transaction, the rule was made absolute to charge the defendant in execution.

Rule absolute.

HUBBERSTEY *v.* Lord LANGFORD.

In an action against the acceptor of a bill of exchange, who was under terms to plead issuably, the Court allowed him to plead a judgment recovered against him on the same bill by a third person.

THIS was an action on a bill of exchange against the acceptor. The declaration was delivered on the 8th of June, at which time the defendant was abroad. The defendant's attorney obtained further time to plead, on the usual terms of pleading issuably, &c. After an attempt to obtain still further time to plead, the attorney, on the 1st of July, pleaded non-acceptance. On the 7th the defendant changed his attorney, and the same day a summons was taken out to change the plea, on the ground that the defendant had been abroad, and was consequently unable to instruct his attorney what defence to make. *Williams*, J. having refused the application, a subsequent application was made to *Park*, J. and refused, and notice of trial was given for the second sittings in this term, November 7th. On the 4th of November a rule nisi was obtained to withdraw the plea, and to plead instead a judgment recovered against the defendant on the same bill of exchange, in an action brought by another person.

E. V. Williams shewed cause in the first instance.—The defendant is under terms to plead issuably; he cannot therefore plead this plea, as it is clearly a demurrable plea, it being no answer to this action to say that a judgment has already been obtained against the defendant by a third party.

Hoggins, contrà.—This plea is not a demurrable plea, but is a good answer to this action. Besides, even if it is, a plea which is open to a general demurrer is within the terms of pleading issuably.

LITTLEDALE, J.—It seems to me that this is a plea which goes to the merits of the action, and therefore leave ought to be given to plead it. The plaintiff may, if he pleases, demur to the plea.

Rule absolute.

SHARMAN *v.* COOK.

Where bail were not put in before the rule for bringing in the body expired, but there had been a render of the defendant, and no trial had been lost, the Court refused to grant an attachment against the sheriff.

W. H. WATSON, on the 9th of November, applied for an attachment against the sheriff. In August the defendant was arrested, and the sheriff returned cepi corpus. A judge's order under the Rule H. T. 3 *W.* 4 (*a*) was then obtained for the sheriff to bring in the body, which expired on the 30th. Bail were put in, but they were practising attornies, and it was therefore

(*a*) 1 Dowl. P. C. 731.

a nullity (*a*). On the 6th of September the defendant was rendered, and an application was made to a judge, who ordered that bail might be put in on payment of costs, and without prejudice to the plaintiff's proceedings against the sheriff. The order to bring in the body having been made a Rule of Court, it was submitted, that, according to the Rule of H. T. 3 *Will.* 4, the sheriff was liable to an attachment.

LITTLEDALE, J.—What can be the object of an attachment? If there has been a render, and no trial has been lost, which there cannot have been in this case, the sheriff can have the attachment set aside on payment of costs, and it will not be ordered to stand as a security (*b*). Supposing he has not taken a bail-bond, the attachment will still be set aside on the same terms, as there has been a render. I cannot therefore grant the attachment (*c*).

Rule refused.

(*a*) Reg. Gen. H. T. 2 *W.* 4, I. 13; 1 Dowl. P. C. 185.

(*b*) Reg. Gen. H. T. 2 *W.* 4, V; 1 Dowl. P. C. 199.

(*c*) See also *The King* v. *The Sheriff of Middlesex*, 2 M. & Selw. 562; and *Harrison* v. ———, 1 Tyr. 531.

MAYNARD *v.* LACKINGTON.

A rule for filing a certificate of the award of costs and taxation thereon, under the Slave Compensation Act, 6 & 7 *W.* 4, c. 5, s. 10, is a rule nisi only.

PETERSDORFF applied to the Court for leave to file a certificate of the award of costs, and of the Master's taxation thereon, under the acts 3 & 4 *Will.* 4, c. 73; 5 & 6 *Will.* 4, c. 45; and 6 & 7 *Will.* 4, c. 5, for compensating the owners of slaves upon the abolition of slavery. By the 10th section of the latter act, the commissioners of arbitration were empowered to award costs against the party opposing a claim for compensation, and to give a certificate of their award of costs, on which certificate the costs were to be taxed; "and if the person or persons by whom such costs shall be awarded to be paid, or who shall be liable to pay the same, shall neglect or refuse to pay the amount so taxed as aforesaid, it shall be lawful for the person or persons to whom the same shall be awarded to be paid, to file the said certificate and taxation signed by the Master, with an affidavit verifying the same, in any of the said Courts; and the Court wherein the same shall be filed is hereby authorised, upon motion made to the said Court, and on being satisfied of the truth of the said affidavit, to order judgment to be entered up for the sum specified in such taxation for the person or persons to whom the same shall be awarded to be paid." The certificate was verified by affidavit, and the only question was, whether the rule should be a rule absolute or only a rule nisi.

LITTLEDALE, J.—It must be a rule nisi only, as the other party may perhaps be prejudiced by the proceeding.

Rule nisi granted.

Bail Court.

Ex parte WOODWARD.

The Court cannot compel a person who holds a power of attorney from an attorney who has absconded, to assign over some articles of clerkship, or to deliver up a bond given for the payment of the premium agreed for, but it will order the articles to be cancelled.

THIS was an application on the part of a person who had been articled to an attorney who had absconded, and was gone to America. A rule nisi had been obtained, calling on the attorney's brother, who had been in partnership with him, and who held a power of attorney to act for him, to shew cause why the articles of clerkship should not be cancelled, or why he should not assign them over to another attorney, and why he should not deliver up a bond which had been given for securing the payment of the premium. The bond had been left with his papers in his brother's possession, who had refused to deliver them up without an authority from his brother.

S. Hughes moved to make the rule absolute on an affidavit of service, no cause being shewn, and submitted that the part of the rule requiring the attorney's brother to assign the articles should be made absolute, as he held the power of attorney to act for his brother, and also the part requiring the delivery up of the bond.

LITTLEDALE, J.—The Court cannot compel the brother to act merely because he holds a power of attorney. The Court has no authority to compel him to assign the articles or to deliver up the bond. Only the part of the rule as to cancelling the articles may be made absolute.

Rule absolute accordingly.

COPE *v.* LEVI.

If a plaintiff gives notice for trial at a sittings in term, and does not enter the cause for trial, the defendant may move for judgment as in case of a nonsuit on the first day of the sittings, before the Court sits at Nisi Prius.

NOTICE of trial was given in this case for the first sittings in the term. On the day of the first sittings, before the Court sat at Nisi Prius, the cause not having been entered for trial, and the notice of trial not having been countermanded, a rule nisi was obtained for judgment as in case of a nonsuit.

Gunning, on a subsequent day, shewed cause against the rule, and contended that the rule had been moved too early, the default in not proceeding to trial not having occurred when the rule was moved. He also contended, that from what appeared on the affidavit in opposition to the rule, the rule ought to be discharged without giving a peremptory undertaking.

Hoggins, contrà.

LITTLEDALE, J.—I think that there was a sufficient default at the time this rule was moved for; but as the affidavits shew a sufficient cause for not proceeding to trial, and for not giving a peremptory undertaking, the rule must be discharged generally.

Rule discharged.

In the matter of TURNER.

An attachment cannot be granted for disobedience to a rule of Court on an affidavit calling it an "order" of Court.

PETERSDORFF moved for a rule for an attachment for disobedience to a rule of Court, on an affidavit in which the "rule" was throughout called the "order" of the Court. The mistake was owing to the circumstance of a judge having made an order which was subsequently made a rule of Court, and it was for disobedience to that rule the attachment was sought for.

LITTLEDALE, J.—I cannot grant the rule on that affidavit; if I were to do so, it might lead to great confusion in the practice in such cases. It is far better that a fresh affidavit should be sworn.

Rule refused.

ROBINSON *v.* HAWKINS.

1. The Rule H. T. 2 *W.* 4, I. 24, is superseded by the Uniformity of Process Act, and therefore a plaintiff may put a bail-bond in suit immediately on the expiration of the time for putting in bail above.

2. In an action on a bail-bond it is unnecessary to indorse on the process the amount of the debt and costs.

THIS was a rule to set aside the proceedings in an action on a bail-bond for irregularity. On the 20th of October the original defendant was arrested; bail above were put in on the 30th; on the 31st the plaintiff took an assignment of the bail-bond, and the same day commenced proceedings on it. There was no indorsement on the process against the bail of the debt and costs.

W. H. Watson shewed cause.—This rule was moved on the ground, that as the arrest was on the 20th of October, the 27th was therefore the last day for putting in bail, and that by the Rule of H. T. 2 *Will.* 4, I. 24 (*a*), it is required that "no bail-bond taken in London or Middlesex shall be put in suit until after the expiration of four days, nor, if taken elsewhere, till after the expiration of eight days, exclusive from the appearance day of the process." Even however supposing that these proceedings were commenced within the four days mentioned in that rule, still that rule is superseded by the Uniformity of Process Act, 2 & 3 *Will.* 4, c. 39. That rule was made for the purpose of assimilating the practice in the different Courts, but the Uniformity of Process Act entirely alters the practice. The warning at the back of the capias says, that "if a defendant, having given bail on the arrest, shall omit to put in special bail as required, the plaintiff may proceed against the sheriff or on the bail-bond." In Mr. *Tidd's* last work on Practice (*b*) that rule is mentioned as being no longer in force, being superseded by the Uniformity of Process Act. The case of *Hillary* v. *Rowles* (*c*) is an express decision to this effect. Another objection is, that there is no indorsement on the summons against the bail of the amount of the debt and costs, according to the Rules of H. T. 2 *Will.* 4, II (*d*), and M. T. 3 *Will.* 4, s. 5 (*e*), but the cases of *Rowland* v. *Dakeyne* (*f*), and *Smart* v. *Lovick* (*g*), decide that to be unnecessary in an action on a bail-bond.—[*Littledale*, J.—How can it

(*a*) 1 Dowl. P. C. 186.
(*b*) New Practice, p. 166.
(*c*) 5 B. & Adol. 460; 2 Dowl. P. C. 201; and see *Alston* v. *Underhill*, 2 Dowl. P. C. 26; 3 Tyr. 427; 1 Cr. & Mees. 492.
(*d*) 1 Dowl. P. C. 198.
(*e*) 1 Dowl. P. C. 471.
(*f*) 2 Dowl. P. C. 832.
(*g*) 3 Dowl. P. C. 34.

Bail Court.
ROBINSON v. HAWKINS.

be necessary to indorse that? In an action on a bail-bond, it must be either on the amount of the bail-bond being paid, or on terms, that the proceedings may be stayed.]

Swann, contrà.—The warning at the back of the capias must mean that the plaintiff shall proceed according to the practice of the Courts, that is, according to the Rule of H. T. 2 *Will.* 4. The object of that rule was to put the bail in the same situation as the sheriff, as the sheriff had four days to put in bail after the return of the writ, and it seemed inconsistent that the bail should be put in a worse situation than the sheriff. It is submitted that the meaning of the warning on the capias is, that the plaintiff may proceed *in such manner* as by the practice of the Court he was then allowed; and that as the bail-bond was put in suit before the four days exclusive from the appearance day of the process had elapsed, during which time bail above were put in, this rule must be absolute on that ground. In the case of *Hillary* v. *Rowles* the attention of the Court was not sufficiently called to the terms of the warning. It is also submitted, that the other point is a good ground for making this rule absolute.

LITTLEDALE, J.—The judgment of the Court in *Hillary* v. *Rowles* is decisive on the first point, that the Rule H. T. 2 *Will.* 4, I. 24, is superseded by the Uniformity of Process Act. I am also clear on the other point, that it is not necessary to make the indorsement on the summons against the bail. The bail must either pay the penalty of the bond or else take such terms as the Court think proper to allow. The rule must therefore be discharged, with costs.

Rule discharged, with costs.

WALTON *v.* MACHIN.

The plaintiff having arrested the defendant for the amount of a bill of exchange, given for goods bought by the defendant of the plaintiff but not delivered, the Court refused to order the plaintiff either to deliver the goods or to sell them and apply the proceeds in payment of the bill.

THE defendant bought three pipes of wine of the plaintiff, and gave his acceptance for the amount, but the plaintiff retained the wine. The bill was not paid when due, and the plaintiff arrested the defendant for the amount. The plaintiff had since been applied to either to deliver the wine, or else to sell it, and hold the proceeds towards payment of the bill, but had refused.

R. V. Richards now applied to the Court for a rule calling on the plaintiff to shew cause why the wine should not be sold, and the proceeds received by the plaintiff in part discharge of the debt. It was submitted, that although the plaintiff might be entitled to retain the wine on the bill being dishonoured, yet that it was hard on the defendant that the plaintiff would neither sell it himself nor give it up, so as to enable the defendant to sell it.

LITTLEDALE, J.—If I were to grant this rule I should be introducing quite a new practice. The defendant must pay the bill and then bring his action for the wine.

Rule refused.

Ex parte TODD.

The Court will grant a rule nisi only, for the attesting witness to make an affidavit of the execution of a submission to arbitration, in order that it may be made a Rule of Court, though the witness's name was only discovered the day before, and though the term was nearly expired in which the party applying was bound to move to set aside the award.

AN award having been made concerning some matters in dispute between two persons, which had been referred by a deed of reference, a rule was obtained in Trinity term for one of the parties to produce the deed of reference, in order that it might be made a Rule of Court, according to one of its provisions. It was produced accordingly on the 17th of November, when it was found that *Stevenson*, an attorney living at Darlington, in the county of Durham, was the attesting witness to the execution.

J. Addison, on Saturday the 18th November, moved for a rule calling on *Stevenson* to shew cause peremptorily on Monday the 20th why he should not make an affidavit of the execution, in order that the deed might be made a Rule of Court.—It is necessary that this affidavit should be made, as it is required by the statute 9 & 10 *Will.* 3, c. 15, that an affidavit of one of the witnesses to the execution should be produced on the deed of reference being made a Rule of Court. As the object of making the deed of reference a Rule of Court is to be enabled to make a motion to set aside the award, and as that motion cannot be made later than Friday, November 24th, which is the last day but one of term, it is submitted that there would not be time to get the necessary affidavit except by granting this peremptory rule. The deed of reference having only been produced the day before, this motion could not be made earlier, and the Court will therefore grant this rule from the necessity of the case; *Clarke* v. *Elwick* (*a*).

LITTLEDALE, J.—How can I grant a rule on a person at Darlington to shew cause on Monday? He might become liable to an attachment when he had not been served with the rule. If I grant a rule, and it is made absolute on Monday, and is then sent down to Darlington, it will get there on Wednesday, and the affidavit may be returned by Friday, but then if the attorney should not be at home, that could not be done. All I can do is to grant an ordinary rule nisi, calling on the attorney to shew cause why he should not make the affidavit; and even then I doubt whether it can be made absolute on Thursday (*b*).

Rule nisi accordingly.

(*a*) 1 Strange, 1.
(*b*) See *Reynolds* v. *Askew*, *ante*, 366; and *In Re Perring and Keymer*, 3 Dowl. P. C. 98.

The QUEEN *v.* The Earl of DUNRAVEN.

1. The Court will discharge an indictment for a nuisance by erecting a building on part of a highway, on a merely nominal fine when the nuisance has been removed, if it appears that the public has not suffered any real inconvenience.
2. A rule for that purpose cannot be absolute in the first instance.

THIS was an indictment for a nuisance to a highway, by building on part of it. The indictment was preferred by a person to whom the nuisance was a great injury, as it prevented free access to his premises. The indictment was removed into the Court of King's Bench by the prosecutor, and judgment was suffered by default.

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Butt moved for a rule that a fine of 6*s.* 8*d.* should be imposed on the defendant, and that thereupon the indictment should be discharged. He moved on an affidavit, verifying a certificate of two magistrates, of the nuisance having been removed, similar to the certificate of a road having been put into complete repair, and submitted that the rule might be absolute in the first instance.

LITTLEDALE, J.—It must be a rule nisi only.

It appeared from the affidavits in opposition to the rule, that a new street had been opened in the town of BridgeE-nd, Glamorganshire, and that the nuisance was a building that had been erected on a part of the old street. It did not appear that the public had suffered any real inconvenience from the building, it being more in the nature of a private injury to the prosecutor.

E. V. Williams shewed cause.—It is competent to the Court to inflict a substantial fine on the defendant, and it is submitted that in this case the Court will do so, as it is not like the case of non-repair of a highway. If a substantial fine is imposed the prosecutor will then be able to petition the crown for part of the fine to reimburse him the costs.

Butt, contrà.—The Court will discharge this indictment, on a nominal fine, in the same way that they would an indictment for non-repair of a road.—[*Littledale*, J.—I think that this is not like the common case of non-repair of a highway, it does not stand on the same principle.]—It is submitted that the Court will act in the same way on an indictment for any nuisance.—[Mr. *Robinson*, of the Crown Office, intimated such not to be the practice.]—It does not appear from the affidavits on the other side that there has, in fact, been any real nuisance to the public, and the Court will therefore impose a nominal fine only. The case made out is, that there has been a private injury, for which an action will lie, and an attempt is now made to obtain damages for that injury by means of this indictment. The Court has no authority to award costs directly to the prosecutor, and it will not do that indirectly which it has not the power to do directly. Besides, there is no affidavit as to the amount of costs which the prosecutor has been actually put to.

LITTLEDALE, J.—From what appears on the affidavits it seems to me that merely a nominal fine must be imposed, as the public has not suffered any real inconvenience. A new street has been opened, and the old one in which the nuisance has been committed still remains until it is stopped up. In a case of a nuisance at Derby, by boiling bones, a fine was imposed by this Court of 300*l.* I do not know what were the particular circumstances of that case, but that sentence has been since questioned by the Court. However, that case is not applicable to the present, where there seems to have been a private injury, which was the subject of an action.

Rule absolute accordingly.

TOULMIN *v.* EDWARDS.

1. Goods were seized in execution on the 15th of August, and a notice of claim was given the next day. A second notice of claim was given on the 30th October, on the part of another person.—*Held*, that an application to the Court by the sheriff, under the Interpleader Act, was not too late on the 9th November, as the second notice of claim was of so peculiar a nature that the sheriff was entitled to some time to inquire into the circumstances.

2. *Semble*, that if the second notice of claim had not been given, the application ought to have been made within the four first days of the term.

ON the 15th of August last, a writ of fieri facias in this action was lodged at the Sheriff's Office. On the 16th the sheriff's officer seized some goods, supposing them to be the defendant's. On the same day notice was given to the officer, by an attorney, that the goods were the property of some trustees of the defendant and his wife, under a marriage settlement. On the 30th of October, another notice of claim was given by the same attorney, on behalf of a person named *Delmar*, who claimed as assignee of *Baker*, a previous husband of the defendant's wife, and who was still living. Term began on the 2d of November, and on the 9th a rule was obtained by the sheriff, under the Interpleader Act, 1 & 2 *Will.* 4, c. 58, s. 6, the affidavit on which the rule was granted having been sworn the day before. The facts of the case were, that, in 1814, the woman was privately married to *Baker*, from whom she was almost immediately separated, and whom she had seen nothing more of until latterly. In 1819, she was married to a second person, who died and left her the goods in question, and, in 1834, she was a third time married to the defendant. On the last marriage the settlement was made by which the goods were vested in the trustees, on whose behalf the first notice of claim was given. The woman had been indicted for bigamy at the last October sessions, was found guilty, and sentenced to some nominal punishment.

Cowling, on behalf of the execution creditor.—This application is too late; the application ought to have been made within the four first days of term. In *Cook* v. *Allen* (*a*) a delay of nine days, and *Ridgway* v. *Fisher* (*b*) a delay of eight days was held sufficient to prevent the Court granting this relief to the sheriff. In this case the first notice was given on the 16th of August, and therefore the application ought to have been made within the four first days of term, as mentioned by *Alderson*, B., in the case of *Beale* v. *Overton* (*c*).

Kelly appeared for the claimant, *Delmar*.

Kennedy, for the sheriff.—There has been no negligence on the part of the sheriff. If the case had depended entirely on the first claim that was made on the 16th of August, it might have been similar to the cases cited. Here, however, a second notice of claim was given on the 30th of October, by the same attorney, on behalf of a person who claimed under a former husband, who was still living, and the circumstances were so peculiar that the sheriff was warranted in making inquiry into those circumstances previous to applying to the Court. It is submitted that the sheriff is bound to make some inquiries as to the nature of the claim before he applies to the Court, as it may turn out to be a perfectly unfounded claim. In *Cooke* v. *Allen* the application was made so late in the term that it was impossible to make the rule absolute in that same term. In *Beale* v. *Overton*, a whole term had been

(*a*) 2 Dowl. P. C. 11; 1 Cr. & Mees. 542; 3 Tyr. 586.
(*b*) 1 Har. & Wol. 189; 3 Dowl. P. C. 567.
(*c*) 1 Mur. & Hurl. 172; 5 Dowl. P. C. 599.

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suffered to elapse before the application was made, and what *Alderson*, B., there says is extra-judicial, and is, moreover, merely a recommendation.

LITTLEDALE, J.—It appears to me that I cannot in this case prevent the sheriff having the benefit of the act. On the 16th of August the first notice of claim to the goods was given, and if there had been no other notice I should have thought the sheriff too late in his application to the Court. I should then have thought with my brother *Alderson*, that the application ought to have been made within the four first days of the term. However, afterwards, on the 30th of October, a second notice of claim was given; and although the claim arose out of the same circumstances, yet it was of so peculiar a nature that I think the sheriff ought to be allowed some time to inquire into the history of the circumstances. The affidavit on which the rule was granted was sworn on the 8th, and the application was made on the 9th, which, under the circumstances, I think is not too late. In *Cooke* v. *Allen* and *Ridgway* v. *Fisher* the applications were, under these circumstances, certainly held too late; and *Beale* v. *Overton* decided that a whole term must not be allowed to elapse before the application is made; but in this case, considering the peculiar nature of the second claim, I think the application was not too late.

An issue was then directed between the parties.

The QUEEN *v.* THOMAS and others.

Certiorari granted to a prosecutor to remove an indictment for forcible entry and detainer from the sessions.

H. HALL moved, on the part of the prosecutor, for a certiorari to remove an indictment for forcible entry and detainer on the stat. 15 *Rich.* 2, c. 2, from the sessions for the West Riding of Yorkshire. The difficult points of law which were likely to arise on the trial were not mentioned in the affidavit on which he moved. It was submitted that the case of *The King* v. *Jowl*(*a*) was not an authority against this application, as in that case the motion was made on the part of the defendant, while here it was made by the prosecutor; in that case also it was an indictment for a nuisance to a road, where the question was merely as to whether the place was a highway or not, while this was an indictment of a very different nature, in which it was evident that difficult points might arise. The affidavit stated that it would be necessary to have a special jury, and that the magistrates before whom the defendants were bound over suggested the removal of the indictment into this Court.

LITTLEDALE, J.—I see no difference between this case and the one cited, on the ground that this is moved by the prosecutor, while that was by the defendant; I think, however, that altogether enough is shewn to allow the certiorari to issue (*b*).

Rule granted.

(*a*) 2 Har. & Wol. 375; 5 Ad. & El. 539; 1 Nev. & Per. 28.

(*b*) See the statute 5 & 6 *Will.* 4, c. 33, s. 1.

BODDINGTON *v.* WOODLEY.

ON the 7th of August the defendant was arrested on a capias, which stated the action to be "on promises." The following was the affidavit of debt.

"*Joseph Payne Street*, of &c., makes oath and says, that by a certain indenture, bearing date the 16th day of October, 1822, and made between *William Woodley* of the one part, and *Samuel Boddington and George Adams Davis*, since deceased, of the other part, the said *W. W.* did grant &c. unto the said *S. B.* and *G. A. D.* and their heirs &c., a certain plantation &c. in the said indenture mentioned, with their and every of their appurtenances, to have and to hold the same unto and to the use of the said *S. B.* and *G. A. D.* their heirs &c., subject to certain charges and incumbrances in the said indenture also mentioned or referred to, and subject also to a certain proviso, that if the said *W. W.*, his heirs &c., did and should, within six calendar months after demand, well and truly pay or cause to be paid to the said *S. B.* and *G. A. D.*, their heirs &c., at the south gate of the Royal Exchange, in London, as well the sum of 6569*l.* 3*s.* 3*d.* of lawful money of Great Britain current in England, thereinbefore mentioned to be due and owing to the said *S. B.* and *G. A. D.*, as also all and singular such further and other sums and sum of money as then were or was, or should or might at any time or times thereafter be or become due and owing from or by him the said *W. W.*, or his executors, administrators or assigns, to the said *S. B.* and *G. A. D.*, or either of them, their executors &c., or which should be by them, or either of them, paid or advanced by the order or to or for the use or on account of the said *W. W.*, his executors &c., in any manner or on any account whatsoever, together with interest at and after the rate of 5*l.* for every 100*l.* of lawful money of Great Britain current in England, by the year, upon or for or in respect as well of the said sum of 6569*l.* 3*s.* 3*d.* as of all and every or any other of the principal sum and sums of money which was and were, or was and were intended to be thereby secured, such interest to be computed on the said sum of 6569*l.* 3*s.* 3*d.* from the first day of May then last past, and upon such other sum or sums as was or were then due or should be and become thereafter due and owing, or should be thereafter paid and advanced, to be computed from the time or respective times of advancing and paying the same respectively, and that without any deduction or abatement whatsoever out of the said principal and other monies, or the interest thereof, or of any part thereof respectively, for or in respect of any present or future taxes, charges, assessments, or impositions whatsoever; and if the said *W. W.*, his heirs &c.,

1. On an application to the Court, to review the decision of a judge as to a matter of irregularity, the party cannot insist on objections which were not made before the judge, unless he is still within a reasonable time for making the application.

2. If a capias state the cause of action to be "on promises," but the affidavit of debt shews that the declaration must be either in debt or covenant, the defendant is entitled to be discharged, and he is not to be compelled to remain in custody until the declaration is delivered, even though he has not been prompt in his application to the Court.

3. An indorsement on a capias, that payment of the debt and costs may be made within four days from the "execution" thereof, instead of "service," is not a ground for discharging the defendant out of custody, but may be amended.

4. An affidavit of debt for money paid to the use of the defendant, according to the terms of a deed, which was set out, but not stating that it was "at his request,"—*Held* good.

5. An affidavit of debt for work done, "as the agent of the defendant and on his retainer," is sufficient, though it does not state it to have been done "at his request."

6. An affidavit of debt set out an indenture of mortgage to secure a sum due, as well as to secure future advances, and averred that a sum was afterwards due to the plaintiff for &c., but without stating that it was due "from the defendant," or that the money was become due in pursuance of the deed.—*Held*, that according to the terms of the indenture the affidavit was sufficient.

7. The indenture being also to secure interest on the whole amount due, the affidavit averred that part of the sum due was for interest computed from &c.—*Held*, that the affidavit was good in this respect.

8. An argumentative conclusion to the affidavit—"and so the deponent says that the defendant is justly and truly indebted," is immaterial, if there is a previous good averment of the debt.

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did and should likewise well and truly pay and cause and procure to be paid unto the said *S. B.* and *G. A. D.*, their executors &c., all such costs, charges and expenses, both at law and in equity, and for commission, factuage, exchange, re-exchange, remittances of money, or otherwise, as should or might become due and payable, be incurred or expended or sustained by the said *S. B.* and *G. A. D.*, or either of them, their executors &c., in or about the recovering and compelling and obtaining and receiving payment of all the said principal and other monies, and interest thereby secured or intended so to be, and every part thereof, then and in such case—[covenant for *S. B.* and *G. A. D.* to re-convey the property]. And the said *W. W.* for himself and his heirs &c. did by the said indenture covenant, promise, grant, and agree, to and with the said *S. B.* and *G. A. D.*, their heirs &c., that the said *W. W.*, his heirs &c., should and would well and truly pay or cause to be paid unto the said *S. B.* and *G. A. D.*, their executors &c., as well the said sum of 6569*l.* 3*s.* 3*d.* as also all and every other the principal sum and sums of money, interests, costs, charges and expenses thereinbefore mentioned, and intended to be thereby secured in manner and form thereinbefore mentioned and appointed for payment thereof, according to the true intent and meaning of the said indenture, as by reference to the said indenture will more fully appear. And this deponent further says, that on the 13th day of January, in the year of our Lord 1837, the said *G. A. D.* being then deceased, there was and still is due to the said *S. B.* the sum of 9000*l.* and upwards, for monies, after the date of the said indenture, paid and advanced by the said *S. B.* and *G. A. D.* in his life-time, for the use and on the account of the said *W. W.*; and for work done by the said *S. B.* and *G. A. D.* in his life-time, and after the date of the said indenture, as the agents of and for the said *W. W.*, and on his retainer; and for commission and reward due and of right payable from the said *W. W.* to the said *S. B.* and *G. A. D.* in his life-time, in respect thereof; and for interest upon the said monies so as aforesaid paid and advanced by and due to the said *S. B.* and *G. A. D.* in his life-time, such interest on the said monies so as aforesaid paid and advanced being computed from the respective times of such monies being advanced and paid by the said *S. B.* and *G. A. D.* as aforesaid. And this deponent further says, that on the said 13th day of January, 1837, the said *S. B.* demanded of the said *W. W.* payment of all sums and sum of money due and owing from him to or on account of the said *S. B.* and *G. A. D.*, but the said *W. W.* has not paid the said sum of 9000*l.* or any part thereof, and so this deponent says that the said *W. W.* now is justly and truly indebted to the said *S. B.* upon the said covenant in the said sum of 9000*l.* of lawful British money."

On the 10th of August a summons was heard before *Williams*, J., at chambers, for discharging the defendant out of custody for irregularity. The irregularities then urged were, first, that it was indorsed on the writ of capias, that the payment of the debt and costs might be made within four days after the "execution" instead of after the "service:" secondly, that the affidavit of debt stated that a certain sum was due to the plaintiff for monies, after the date of the indenture, paid and advanced by the plaintiff and *Davis* for the use and on the account of the defendant, and for work done by the plaintiff and *Davis*, as the agents of the defendant, and on his retainer, but that it was not stated to have been "at the request of the defendant." *Williams*, J.,

thought that these were not grounds for discharging the defendant, and accordingly, on the first day of this term, a rule nisi was obtained for discharging the defendant on account of those objections, as well as for other objections to the affidavit of debt.

F. Robinson shewed cause against the rule, and *Kelly* and *J. Bayley* supported it.

On the argument it was contended that the defendant was bound to go before a judge at chambers to make all objections to the affidavit to hold to bail, and could not wait until the term commenced; *Hinton* v. *Stevens* (*a*), *Fowell* v. *Petre* (*b*), and *Mortimer* v. *Piggot* (*c*) : and that he could not avail himself of any objections which were not urged at chambers; *Thorpe* v. *Bere* (*d*). On the first of those objections, that the writ was indorsed with the word "execution" instead of "service," as directed by the rule H. T. 2 *Will.* 4, II. (*e*), the cases of *Pocock* v. *Mason* (*f*) and *Colls* v. *Morpeth* (*g*) were cited. The second objection was urged as a non-compliance with the rule of H. T. 2 *Will.* 4, I. 8. (*h*). The other objections, which had not been made at chambers, were, first, that it was not averred, either directly or by implication, that the 9000*l.* and upwards were due "from the defendant," or that the money was become due "in pursuance of the deed." The second was, that the defendant was arrested for interest partly, and it was not stated how much of the amount was due for interest, and that it did not appear by the deed that interest was to become due on the money advanced for work done, and that there was not any day from which the interest on that money so advanced could be reckoned. The third objection was, that the affidavit was argumentative, as it concluded—"and so this deponent says that the said *W. W.* now is justly and truly indebted to the said *J. B.* upon the said covenant in the said sum of 9000*l.*," and the cases of *Jennings* v. *Martin* and *Bright* v. *Purrier* (*i*) were referred to. The last objection was, that there was a variance between the capias and the affidavit of debt, the former stating the action to be on promises, while the latter disclosed a cause of action either in debt or covenant; *Naylor* v. *Eagar* (*k*), *Green* v. *Elgie* (*l*), *Barker* v. *Weedon* (*m*).

Cur. adv. vult.

LITTLEDALE, J. afterwards, November 22d, gave judgment.—This was a rule to shew cause why the defendant should not be discharged out of the custody of the marshal. The questions arise chiefly on the sufficiency of the affidavit to hold to bail made in August last. [The learned judge then recited the affidavit.] On this affidavit several questions now arise. It

(*a*) 1 Har. & Wol. 521; 4 Dowl. P. C. 283.

(*b*) 2 Har. & Wol. 379; 5 Dowl. P. C. 276; 1 Nev. & Per. 227; 5 Ad. & El. 818; and see *Robins* v. *Grant*, *ante*, 373, and *King* v. *Myers*, *ante*, 372; 5 Dowl. P. C. 686.

(*c*) 2 Dowl. P. C. 615.

(*d*) 2 B. & Ald. 373.

(*e*) 1 Dowl. P. C. 198.

(*f*) 1 Bing. N. R. 245; 3 Dowl. P. C. 104; but see *Hulme* v. *Ash*, *ante*, 381.

(*g*) 3 Dowl. P. C. 23. See also *Lord Paget* v. *Stockley*, 1 Hodges, 317; *Cooper* or *Hooper* v. *Waller*, 3 Dowl. P. C. 167; 1 Cr. Mees. & Ros. 437; 5 Tyr. 130; *Sutton* v. *Burgess*, 1 Gale, 13; 3 Dowl. P. C. 489; 1 Cr. Mees. & Ros. 770; 5 Tyr. 320; *Shirley* v. *Jacobs*, 3 Dowl. P. C. 101; 1 Scott, 67; *Urquhart* v. *Dick*, 3 Dowl. P. C. 17.

(*h*) 1 Dowl. P. C. 184; and see *Durnford* v. *Messiter*, 5 M. & Selw. 446.

(*i*) 3 Burr. 1447, 1687.

(*k*) 2 Y. & Jerv. 90.

(*l*) 3 B. & Adol. 437; 1 Dowl. P. C. 344.

(*m*) 1 Cr. Mees. & Ros. 396; 2 Dowl. P. C. 707; 4 Tyr. 860.

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to the plaintiff. I think, therefore, on that part of the objection, that I cannot say the affidavit is insufficient.

Then, as to the claim for interest; there is a contract stated for the payment of interest, and it is stated that it is to be computed from certain specified times. I think, therefore, that the affidavit is sufficient in form as to that claim for interest, and as to the time from which it is payable.

The next objection was, that the affidavit is argumentative, as it concludes "and so this deponent says that the defendant is justly and truly indebted to the plaintiff upon the said contract in the said sum of 9000*l.*" I agree with the counsel for the defendant, that those words will not help the affidavit if a debt is not alleged in the previous part of the affidavit; but if those words were struck out, I think that it would sufficiently appear on the affidavit that the money was due pursuant to the indenture. In this respect also, therefore, the affidavit is sufficient.

It was next objected, that it is not sufficiently alleged that the money was become due in pursuance of the deed; I think that allegation is not necessary. The indenture states that the defendant is to be liable for all future advances, but does not state they need be made in pursuance of the deed; it is generally whatever becomes due and owing in future.

The last point was, as to the variance between the affidavit and the process. The affidavit discloses a cause of action either in *debt* or *covenant*, but the process varies from it, as it mentions an action "on promises." It has been answered to this objection, that since the ac etiam clause in process has been done away with, that this objection of a variance between the affidavit and the process cannot be insisted on; but I think that that is not so; and the question therefore is, whether this is such a variance as will entitle the defendant to his discharge. Now if it is considered as an irregularity, the defendant is too late in this application. If he had made the objection before my brother *Williams*, it would have been otherwise, but he is now too late if it is an irregularity merely. Still it seems to me that it is to be considered in another view. If a declaration is now delivered, it must be either in debt or in covenant, and cannot be on promises. If the plaintiff should choose to declare on promises, the defendant would certainly be entitled to his discharge for the variance between the declaration and the affidavit to hold to bail. Then again, if the plaintiff declares either in debt or covenant, the declaration will vary from the process, and on that account the defendant will be entitled to his discharge. Either way, therefore, there must be a variance. Now as the defendant will be entitled to make this objection when the declaration is delivered, I think that it is competent for him to make it at the present time also. His first opportunity to make the objection is when the variance appears between the affidavit and process; and secondly, when the declaration is delivered. I think, therefore, that the defendant may now be allowed to make the objection, as when the declaration is delivered he must necessarily be discharged. I think that he is not to remain in custody until that time, but may be immediately discharged, and ought not to be compelled to come again and apply to the Court. The rule is in form, that he should be discharged "for irregularity;" it must be absolute on a common appearance being entered, but it must not be drawn up that he is discharged for irregularity.

Rule absolute accordingly.

KENDRICK *v.* DAVIS.

THIS was a rule for an attachment for non-performance of an award. In Trinity term last a rule nisi for setting aside the award was discharged, for reasons which are already reported (*a*). It appeared on the affidavits filed on the present rule, that the plaintiff had paid the 10*l.* 5*s.* 2*d.*, being the costs of the award, to the arbitrator: that the costs of the cause and of the reference had not been taxed by the Master: that three separate demands had been made for the three sums awarded by the arbitrator to be paid by the defendant, but that no notice was given when the demand was made for the 10*l.* 5*s.* 2*d.*; that that sum had been paid to the arbitrator by the plaintiff. It also appeared that the defendant had offered to pay what was properly awarded, if the plaintiff would have the costs taxed by the Master.

1. If three separate demands are made for three sums ordered to be paid by an award, one of which is improperly awarded, the party may yet have an attachment for the two others.

2. An award ordered the defendant to pay to the arbitrator the costs of the award, and if the plaintiff paid them, ordered the defendant to repay them. On making a demand for these costs, in order to entitle the plaintiff to move for an attachment, notice should be given to the defendant that the plaintiff had paid them.

3. An attachment cannot be granted for non-payment of a sum pursuant to an award, if on a demand made, the party offers to pay, on the costs, which were to follow the result of the award, being taxed.

Walton shewed cause.—In this case *Coleridge*, J. last term decided that the arbitrator had no power to award the sum of 32*l.* 15*s.* 2*d.* to be paid by the defendant for the costs of the cause and of the reference, and that according to the terms of the submission those costs ought to have been taxed by the Master. It is impossible therefore for an attachment to issue for the sum so awarded for costs. So also as to the sum of 10*l.* 5*s.* 2*d.*, paid to the arbitrator for the costs of the award; the award directs the defendant to pay them, but if the plaintiff pays them to the arbitrator, it directs the defendant to repay them to the plaintiff. Notice, therefore, ought to have been given to the defendant, when the demand for that sum was made, that the plaintiff had so paid them; and that notice not having been given, the attachment cannot issue for that sum (*b*). If the attachment cannot issue for either of these two sums, neither can it issue for the third sum of 19*l.* 0*s.* 1*d.*, for the case of *Strutt* v. *Rogers* (*c*) has decided, that if a demand is made for too large an amount, an attachment cannot issue for part. The case of *Whitehead* v. *Firth* (*d*) seems an authority to the same effect, though the point was not expressly decided. It also appears that the defendant has expressed his willingness to pay the sums which have been properly awarded as soon as the costs are taxed; there has therefore been no contempt on his part, and an attachment cannot be issued.

Cresswell, contrà.—Two of the sums awarded to be paid by the defendant have been properly awarded, and as to them, therefore, an attachment must issue. The case of *Strutt* v. *Rogers* is easily distinguishable from the present, as there the demand was for one entire sum; but here separate demands were made for three separate sums, and an attachment may therefore issue for either of them, though another has been improperly demanded. In the same way the defendant is not justified in refusing to pay the two sums of 19*l.* 0*s.* 1*d.* and 10*l.* 5*s.* 2*d.*, because the costs of the cause, and of the reference, have not been taxed; and as to them, therefore, the attachment may issue.

(*a*) *Ante*, 376.
(*b*) See *Smith & Reeves*, 2 Har. & Wol. 306.
(*c*) 7 Taunt. 213.
(*d*) 12 East, 166.

Bail Court.

KENDRICK v. DAVIS.

LITTLEDALE, J.—Independently of the last point of the offer that was made to pay if the costs were taxed, it appears that the arbitrator had no power to tax the costs of the cause, nor yet the costs of the reference, which were equally liable to taxation by the Master. The costs of the award were directed to be paid by the defendant, but if the plaintiff paid them, the defendant was ordered immediately to repay and reimburse them. Now if the plaintiff seeks to enforce by attachment, this award as to the costs of the award, notice ought to have been given at the time the demand was made, that the plaintiff had paid those costs as ordered by the award. I agree with the case of *Strutt* v. *Rogers*, that where too large a demand is made for one *entire* sum, there an attachment cannot be granted; but here there were three separate and distinct demands made for the three different sums, one of which was good and the other two bad. If there had been a general refusal to pay them, I think the defendant would have been liable to an attachment for the 19*l.* 0*s.* 1*d.*; but then as the plaintiff comes here to demand other sums besides what she was entitled to, the rule would have been absolute on the costs of the rule being paid; but from what is now shewn of the offer to pay if the costs were taxed, I think that the defendant was not bound to pay until the costs were taxed, unless the other party gave up her right to the costs, and therefore this rule must be discharged, but, under the circumstances, without costs.

Rule discharged, without costs.

Ex parte SMITH.

1. A Rule of Court having ordered an attorney to deliver a signed bill of costs to the present attornies of his client, an attachment cannot be granted for disobedience to the rule on a demand made under a power of attorney executed by the client.

2. *Quære*, whether the attornies could have executed a power of attorney to make a valid demand.

A Judge's order was obtained, ordering an attorney to deliver a signed bill of costs which had been incurred for Mr. *Smith* to Messrs. *Capron*, who were his present attornies, and lived in London. The order was afterwards made a Rule of Court. The attorney on whom the rule was made lived at Northampton. The bill of costs not having been delivered accordingly, a formal demand of it was made by a person under a power of attorney executed by Mr. *Smith*. Afterwards, on the 30th of May last, a rule nisi for an attachment for disobedience to the Rule of Court was granted. In October the bill of costs was delivered to Mr. *Smith*.

Sir *W. W. Follett* now shewed cause against the rule for the attachment.—This rule cannot be made absolute, as there has not been a proper demand of the bill of costs. The order and Rule of Court directed it should be delivered to Messrs. *Capron*, but the person who made the demand acted under a power from Mr. *Smith*. The order was originally incorrectly drawn up, and should have directed the bill of costs to be delivered to Mr. *Smith*.

Barstow, contrà.—Mr. *Smith* was the only person who could execute the power of attorney, he being the party on whose account the Rule was obtained. Messrs. *Capron* merely acted for him, and as they acted under a delegated power, they could not again delegate that power to another person.

LITTLEDALE, J.—It appears to me, that although it has not in form, yet in

substance the Rule has been complied with, as the bill of costs has at last been delivered. However, previous to it being complied with, this rule nisi for an attachment was granted. Now it is necessary that there should be a demand made before an attachment can be granted. That was done by a person acting under a power of attorney from *Smith*, but the order was to deliver the bill of costs, not to *Smith*, but to Messrs. *Capron*. I do not say that they could have delegated their authority to receive it, but if they could not themselves conveniently make the demand, they should have applied to have the Rule of Court altered, so as to have made the bill of costs to be delivered either to *Smith* or some other person. Here there has been no demand by Messrs. *Capron*, to whom the bill was directed to be delivered. I do not say whether they could delegate their authority to receive it, but either one of the partners ought to have gone down to make the demand, or they should have had the Rule altered. There cannot, therefore, be an attachment granted; but as the Rule of Court had not been complied with at the time this Rule was moved, I shall not discharge it with costs.

Rule discharged, without costs.

Tory *v.* Stevens.

THIS was a rule nisi granted on the first day of term (November 2d), to shew cause why the declaration should not be set aside for irregularity, on the ground that it stated that the defendant had been "summoned," when, in fact, he had been arrested on a capias (*a*). The declaration was delivered on the 10th of August, together with a particular of demand. On the 21st an application was made to *Gurney*, B., by the bail, for the bail-bond to be delivered up to be cancelled, on a common appearance being entered, on the ground of the variance in this respect between the writ and the declaration, but the application was refused. On the 23d of October a summons for better particulars was taken out. On the 1st of November the time for pleading expired, when notice was given that application would be made to the Court to set aside the declaration. On the 2d, before the Judgment Office opened, a plea of the general issue was delivered, together with a protest that it was delivered to prevent the plaintiff signing judgment, and referring to the irregularity in the declaration.

A declaration was delivered on the 10th of August, in which it was stated that the defendant had been "summoned," whereas he had been arrested. On the 21st an application was made by the bail to a judge at chambers to deliver up the bail-bond to be cancelled for this variance between the writ and the declaration, which was refused. A summons for particulars of demand was then taken out, and a plea was delivered with a protest:—*Held*, first, that this was an irregularity; secondly, that it was not waived by taking out the summons for the particulars, nor by pleading under a protest; thirdly, that the plaintiff ought to have applied to a judge at chambers to set aside the declaration for the irregularity; and fourthly, that not having done so, an application to the Court on the first day of Michaelmas term was too late.

Peacock shewed cause.—This application is too late, not having been made within a reasonable time, and also because a step has been taken, contrary to the rule of H. T. 2 *Will.* 4, I. 33 (*b*). The case of *Cox* v. *Tullock* (*c*) is an authority to shew that a summons should have been taken out before a judge at chambers to set aside the declaration for the irregularity. *Anderdon* v. *Alexander*, *Earl of Stirling* (*d*), and *Hinton* v. *Stevens* (*e*), are other autho-

(*a*) Reg. Gen. M. T. 3 *Will.* 4, I. s. 15; 1 Dowl. P. C. 475.
(*b*) 1 Dowl. P. C. 187.
(*c*) 2 Dowl. P. C. 47; 3 Tyr. 578.
(*d*) 2 Dowl. P. C. 267.
(*e*) 1 Har. & Wol. 521; 4 Dowl. P. C. 283; see also *Elliston* v. *Robinson*, 2 Dowl. P. C. 241; 2 Cr. & Mees. 343; 4 Tyr. 214.

Bail Court.

TORY v. STEVENS.

rities to the same effect.—[*Littledale*, J.—There may be a question whether he was bound to make any application to a judge between the 10th of August and the 24th of October (*a*).]—The irregularity is also waived by taking out the summons for particulars of demand, and again, by pleading. The delivery of the protest is of no avail, for if the defendant had a right to come to the Court to set aside the judgment for irregularity, it was unnecessary to deliver a plea at all.—[*Littledale*, J.—I think that the defendant was not bound to run the risk of such a course.]—The case of *Hinton* v. *Stevens* also shews that this irregularity has been waived.

James, contrà.—The Court will never decide that the delivery of the plea with a protest, which referred to this very irregularity, is a waiver of the irregularity. If the defendant had not pleaded, the plaintiff would have signed judgment, and the next day have served a rule to compute, by which means unnecessary expense would have been incurred. Neither is the summons for particulars of demand any waiver, as without the particulars of demand the defendant could not know what to plead. It was unnecessary for the defendant to apply by summons to a judge, after the refusal of the application on the part of the bail, and had such a second application been made, it would have been said that the defendant should wait, as the plaintiff might amend his declaration.

Cur. adv. vult.

LITTLEDALE, J. afterwards (November 23d) gave judgment.—This was an application to set aside a declaration for irregularity, the irregularity being, that it was stated the defendant had been summoned instead of arrested. That was the ground of the application, and I have no doubt but that the declaration is on that account irregular. Soon after the declaration was delivered, application was made to Baron *Gurney*; but the application then was, that the bail-bond should be delivered up to be cancelled, and no application was made to set aside the declaration for the irregularity. Baron *Gurney* dismissed the application, and if that had been followed up by a summons to set aside the declaration, and that had been refused, the defendant would have been in time in his appeal to the Court. For although it is necessary that a party should apply promptly, and before a step is taken in the cause, and here, on the 23d of October, a summons for particulars of demand was had, and the time for pleading expired, and a plea was delivered under a protest, yet all that, I think, would not preclude the defendant from appealing to the Court. If he makes his appeal to the Court to see what they will say, still I think he is bound to plead; and as he cannot know what to plead without having a particular of demand, therefore he would not be precluded either by obtaining the particular or by pleading the plea under a protest. But though all that would be the case if an application had been made to a judge at chambers by the defendant, to set aside the declaration for irregularity, yet here the application was by the bail for the bail-bond to be delivered up to be cancelled. I think that was an application which a judge could not entertain, but it has nothing to do with this application. The defendant should have followed up that application by

(*a*) See the statute 2 & 3 *W.* 4, c. 39. s. 11, and Reg. Gen. M. T. 3 *W.* 4, I. s. 12, 1 Dowl. P. C. 473.

TORY v. STEVENS.

taking out a summons to set aside the declaration for the irregularity, and then, if it had been refused, should have made his appeal to the Court; and not having done so, I think this application is too late, and the rule must therefore be discharged.

Rule discharged.

Ex parte BAKER.

A country attorney employed his London agent to receive some money under a power of attorney from his client:—*Held*, that the latter could not compel the London agent, by means of a summary application, to pay him over the money.

THE applicant, who lived in the country, being entitled to receive a dividend from the estate of *Macintosh* & Co. of Calcutta, employed *Dalby*, an attorney at Birmingham, to prepare a power of attorney, which it was necessary should be executed in order to receive the dividend from the agents in London, Messrs. *Cockerell* & Co. *Dalby* employed his town agent *Knox*, to inquire what was the necessary form of the power of attorney; the power was then prepared, was signed by the applicant, and was sent by *Dalby* to *Knox*, who received the money under it. A rule having been obtained calling on *Knox* to shew cause why he should not pay to the applicant the money so received, and the costs of this rule,

Busby shewed cause.—There does not exist such a relation between the applicant and *Knox* as will justify the Court in interfering in this summary way. *Knox* was the agent of *Dalby*, and knows nothing whatever of the applicant. The case of *Williams* v. *Everett* (*a*) shews that an action for money had and received would not lie by the applicant against *Knox*, as there is no privity between them. So, also, this Court will not interfere if there is no privity. *In Re Fenton* (*b*) decides that the Court will not exercise their summary jurisdiction over an attorney at the instance of a party who is not the party employing the attorney.

Erle, contrà.—This is the common case of a town agent who gets possession of the money of the client of a country attorney, and attempts to set it off against money due to him by the country attorney. In the case of *Moody* v. *Spencer* (*c*), it was held that a town agent had no lien for the general balance due to him from a country attorney, upon money of a client of the country attorney coming to his hands in a cause in which he acts as town agent. That case also shews that an action for money had and received would be maintainable by the applicant against *Knox*. Again, in the case of *White* v. *The Royal Exchange Assurance Company* (*d*), an attempt was made to set up such a lien, but the Court would not allow it, and ordered a sum of money to be paid by the London agent to the client in the country, on the client paying for the agency in the particular cause. So, also, in Chancery it is held, that a town agent has a lien on money he receives in a cause, as far as he has incurred expenses in that particular cause, but that he cannot, as against a client, retain that money for the general balance due to him by his country correspondent. The case of *In re Fenton* is distinguishable; in that case there was no employment of the attorney by the applicant, here the employment of *Knox* is an employment by the applicant,

(*a*) 14 East, 582.
(*b*) 1 Har. & Wol. 310; 3 Ad. & El. 404.
(*c*) 2 Dowl. & Ryl. 6.
(*d*) 1 Bing. 20; 7 Moore, 249.

Bail Court.

Ex parte Baker.

as a town agent is, in fact, to be considered as employed by the client of his country correspondent.

Littledale, J.—I do not dispute the doctrine laid down in the cases of *Moody* v. *Spencer* and *White* v. *The Royal Exchange Assurance Company*. This is not an action for money had and received against *Knox*, but is a summary application against him as an attorney of the Court. Formerly, the rule was laid down that such an application would only be granted when the money had been received in the progress of a cause which was pending in Court, but that rule was extended in the case of *In re Aitkin* (*a*). It was there held, that if an attorney, by reason of his professional character, has confidence placed in him, and so obtains money of a client, that he stands in the same situation as if the money had been received in a cause. That is the limit to which the rule has been extended; now is that the present case? Here *Baker* employs *Dalby* as his attorney, and *Dalby* gives a power of attorney to *Knox* to receive this money, but he does not give it to him in the character of attorney to *Baker*, but only as the agent of *Dalby*, and so he is not within the rule. On the ground, therefore, that this case would carry the rule further than it was *In re Aitkin*, this rule must be discharged. I do not say that an action for money had and received will not lie, but only that this summary application cannot be supported, and therefore the rule must be discharged, but without costs.

Rule discharged, without costs.

(*a*) 4 B. & Ald. 47.

Lewis *v.* Gompertz.

To support an application to the Court to set aside a judgment on a warrant of attorney, on the ground that no attorney was present on behalf of the defendant, it is not sufficient that it should appear that the defendant was in custody; it must appear that he was in custody on mesne process.

THIS was a rule to shew cause why the final judgment signed on a warrant of attorney, and the fieri facias issued thereon, should not be set aside. The affidavit on which the rule was granted stated that the defendant was "a prisoner in custody" when the warrant of attorney was given, but not whether it was on mesne or final process. No attorney was present on his behalf when it was given.

Platt and *Hoggins*, on shewing cause, contended, that the objection that the warrant of attorney was not witnessed by an attorney for the defendant, as required by the Rule of H. T. 2 *Will.* 4, I. 72 (*b*), could not be maintained, as the affidavit did not shew that the defendant was in custody on mesne process, to which case only the rule applied.

Alfred S. Dowling, contrà, contended that enough appeared on the affidavit to shew that the defendant was a prisoner, and that if he were in custody on final process, that fact ought to be stated on affidavit in opposition to the rule.

Coleridge, J.—I have no difficulty as to the position of this rule. The

(*b*) 1 Dowl. P. C. 192.

rule itself, in terms, is to set aside the judgment and execution on the warrant of attorney, but the objection made is to the warrant of attorney itself. It is said that it is void because it does not comply with the Rule of H. T. 2 *Will.* 4, but that rule refers to warrants of attorney given by persons in custody on mesne process only, whereas the affidavit on which this rule was granted merely states that the party was a prisoner in custody. It is urged that that is sufficient, but I think that it is necessary the defendant should shew clearly that he is within the strict terms of the rule.

Rule discharged, with costs (*a*).

(*a*) See *France* v. *Clarkson*, *ante*, 383; 5 Dowl. P. C. 699; and *Wetherall* v. *Long*, 1 Will. Wol. & Hod. 58; 6 Dowl. P. C. 267.

ORD *v.* ROBINSON.

If a cause has been removed by certiorari from an inferior Court after judgment, a rule may be granted for quashing the certiorari, though the party is entitled to a rule for a procedendo.

THIS was a rule to shew cause why a certiorari and the return thereof, removing a cause from the Borough Court of Newcastle-upon-Tyne, should not be quashed, on the ground that the certiorari issued after final judgment. The affidavit in support of the rule stated that judgment had been given for 30*l.* for want of appearance, but did not state what was the form of the action; and the affidavit in opposition stated the judgment was incomplete, but did not say how.

Wightman shewed cause.—If final judgment has been signed in this cause it is a good ground for this Court granting a procedendo, but it is no ground for quashing the certiorari, which has issued regularly. All the cases shew that the form of motion under these circumstances has never been to quash the certiorari, but for a procedendo. The case of *Laudens* v. *Sheil* (*b*) is an exception, but there the motion was for a procedendo as well as to quash the certiorari. In *Walker* v. *Gann* (*c*), which is the authority on which this rule is moved, the motion was for a procedendo. This rule must also be discharged on the merits, as it does not appear from the affidavits that more than an interlocutory judgment was signed, and therefore, according to the case of *Godley* v. *Marsden* (*d*), the cause was properly removed.

Hance contrà.—The rule is laid down distinctly in *Tidd*'s Practice (*e*), that a certiorari does not lie to remove a cause after judgment, and the case of *Walker* v. *Gann* is referred to. The certiorari having therefore clearly issued improperly, it is immaterial that this application is in form for quashing the certiorari and return, and not for a procedendo. The Court will besides, if necessary, modify the rule and award a procedendo. This is the only course that can be adopted, and having quashed the certiorari and return, a rule for a procedendo may then be obtained.

COLERIDGE, J.—It seems to me that on what are called the merits of this case I must consider this as a final judgment, and that therefore the certiorari

(*b*) 2 Dowl. P. C. 90.
(*c*) 7 Dow. & Ryl. 769.
(*d*) 6 Bing. 433; 4 Moore & Payne, 138.
(*e*) P. 400, 9th edit.

Bail Court.

ODD v. ROBINSON.

issued improperly. It is then said that the application ought to have been for a procedendo instead; that certainly would have been a more advantageous course to the party moving for this rule, but I think that that course is not inconsistent with the present, and therefore I do not see why this rule may not be made absolute.

Rule absolute.

Hance, the next day, obtained a rule nisi for a procedendo from *Littledale*, J.

OTHO King of Greece *v.* WRIGHT.

1. The Court will compel the sovereign of a foreign state to give security for costs like any other person.
2. If after plea, the plaintiff materially amends his declaration, the defendant is not too late in applying for security for costs:
3. The plaintiff having resisted the motion, the Court compelled him to pay the costs of the rule, though it did not appear that any demand had been made for the security previous to applying to the Court.

THIS action was brought by the King of *Greece*, by order of his ambassador in this country, on an agreement for establishing a national bank in Greece, and the damages in the declaration were laid at 20,000*l*. The writ of summons issued on the 14th of June; the declaration was delivered on the 3d of July, and the defendant pleaded on the 26th of October. On the 3d of November the plaintiff obtained a judge's order to amend his declaration, with leave for the defendant to plead de novo. The amended declaration was delivered on the 7th of November. It was stated in argument, but did not appear on the affidavits, that the amendments made were not merely formal ones, but substantially altered the statement of the cause of action; and that, in consequence, the defendant would be obliged to plead five new pleas, the issues on which would be quite different from the issues on the former pleas. On the 8th of November, a rule was obtained to shew cause why the plaintiff should not give security for costs, and why he should not pay the costs of the application, on the ordinary affidavit, that the plaintiff was resident abroad, beyond the jurisdiction of the Court. The rule was not drawn up with a stay of proceedings. It did not appear on the affidavits on either side, that previous to the application to the Court any demand of the security had been made on the part of the defendant.

Sir *J. Campbell*, A. G., shewed cause.—There are two objections to this rule being made absolute. The first is, that the plaintiff is an independent sovereign of a foreign country, and, having a right to sue in this country, is not to be considered in the same situation as an ordinary plaintiff. In the case of *The Duke de Montellano* v. *Christin* (*a*), Lord *Ellenborough* refused to compel a foreign ambassador to give security for costs. He there says, "Considering that an ambassador is the immediate representative of the crowned head whose servant he is, it would hardly be respectful, in the first instance, to exact such a security, unless there were pregnant reasons for believing it to be necessary." In that case even a rule nisi was refused. If then security for costs cannot, on this ground, be enforced against an ambassador, à fortiori it cannot against the sovereign himself, whose representative the ambassador is. No special grounds are laid in this case to bring it within the exception referred to by Lord *Ellenborough*. The second objection to this rule is, that the application is made too late. The rule is, that such an application must be made before the defendant takes a step in the cause after

(*a*) 5 M. & Selw. 503.

the declaration is delivered, so as to prevent unnecessary costs being incurred. Here the defendant has pleaded, and although the plaintiff has since amended his declaration, and the defendant has again to deliver his pleas, still that does not restore the defendant to the position he was in before he delivered his first pleas. In the case of *Duncan* v. *Stint* (*a*) it was held, that a motion for security for costs, on the ground of the plaintiff being resident abroad, could not be made after the defendant had taken a step in the cause, if he was previously acquainted with the fact of the plaintiff being resident abroad. There is no doubt but that this defendant was aware that the plaintiff was living out of the jurisdiction of the Court, and with the knowledge of that fact he took a step in the cause. The only question that remains is, whether the rule of H. T. 2 *Will.* 4, I. 98 (*b*), directing that applications for security for costs must be made before issue joined, makes any alteration in the practice as laid down in *Duncan* v. *Stint*. It is submitted that it does not; for, while that rule prohibits the application being made after issue joined, it does not say it may be made at any time before, and does not alter the rule that it must be made before the defendant has taken a step in the cause.

Sir *W. W. Follett* and *R. V. Richards*, contrà.—As to the last objection it cannot be supported. Even under the old rule of practice the application would be in time, as the plaintiff, by amending the declaration and making it so totally different to what it was originally, has completely altered the position of the defendant. It is submitted, that by the old practice the application might have been made at any time before plea, and if the plaintiff amended his declaration, the defendant was put into the same position as before, having the same time to plead to the amended declaration that he had before, and so also having again an opportunity to apply for security for costs. But the rule of H. T. 2 *Will.* 4, I. 98, has now altered the practice, and the application may be made at any time before issue is joined. The case of *Fletcher* v. *Lew* (*c*) is decisive on the point. There the same arguments were used as in the present case, but the Court held that the defendant was entitled to have security for costs, though the motion was made after a plea pleaded with knowledge of the fact of the plaintiff being resident abroad.—[*Littledale*, J.—In *Fry* v. *Wills* (*d*), which was before me, I observe that one reason I gave for granting a similar application after the defendant had obtained time to plead, the plaintiff having delayed declaring for a long time, was, that the defendant was not bound to take any step towards obtaining security for costs, until he perceived that the plaintiff, by declaring, was in earnest.]—As to the other objection, it does not appear that if a foreign sovereign chooses to sue in the Courts of this country he is any respect in a different situation from any other person; he must sue, it is submitted, in exactly the same way. The reasons which are reported as those of Lord *Ellenborough*, for refusing the rule in *The Duke de Montellano* v. *Christin*, seem a little confused. Besides, that case did not come within the ordinary rule, as there the plaintiff was living within the jurisdiction of the Court. This

(*a*) 5 B. & Ald. 7(2; 1 Dow. & Ryl. 348; see also *Wainwright* v. *Bland*, 1 Gale, 333; 4 Dowl. P. C. 547; 2 Cr. M. & Ros. 740; 1 Tyr. & Gr. 37.

(*b*) 1 Dowl. P. C. 196.

(*c*) 3 Ad. & El. 551; 1 Har. & Wol. 430; 5 Nev. & Man. 351.

(*d*) 3 Dowl. P. C. 6.

Bail Court.

OTHO ing of Greece v. WRIGHT.

point, however, was settled by another case, that of *The Emperor of Brazil* v. *Robinson* (*a*), which was a precisely similar case, yet the Court compelled the emperor to give security for costs like any other person.

LITTLEDALE, J.—With regard to the first point, that the plaintiff is King of Greece, and the sovereign of a foreign state, and that he is not on that account to be placed in the same position that other plaintiffs are, it appears to me that the last case quoted is decisive. If a foreign prince chooses to sue in the Courts of this country he must be subject to the ordinary rules of the Courts, and particularly so in a case involving commercial dealings, if he has chosen to engage in such transactions. If, for instance, the Pacha of Egypt, who, though not an independent sovereign, yet acts as such, and who exports cotton to this country, were to sue in the Courts of this country, he might, in my opinion, be compelled to give security for costs. However, on the authority of the case of *The Emperor of Brazil* v. *Robinson*, without entering into the grounds of that decision, I think that there is no objection on this ground for granting this rule. As to the second point, that the application is too late, I do not say that under the new rule a party may, in all cases, make this application at any time before issue is joined, yet it appears to me that the rule provides a sort of guide as to how the Courts are to act in these cases. Now it appears here that the action was commenced on the 14th of June; the defendant then certainly was aware that the plaintiff was resident abroad. The declaration was delivered on the 3d of July, and on the 26th of October the defendant pleaded, and in all probability more than one summons for him to plead had previously been obtained. On the 3d of November the plaintiff obtained an order to amend the declaration, and, as I collect, a material alteration was then made in its form. It seems to me that the defendant was thereby put in the same situation as if the declaration had been then for the first time delivered. I do not say that this would be so in all cases where the declaration is amended, but when the declaration is materially altered, the defendant may say, it is now put in so different a form that I ought to call on the plaintiff to give security for costs. Taking, therefore, into consideration both the new rule and also the amended declaration, I think that this application is in time, and the rule must therefore be made absolute (*b*).

Sir *J. Campbell*, A. G., then submitted that the defendant ought to pay the costs of the application, as it did not appear that any demand of the security had been made by the defendant, previous to the application to the Court. He cited *Fletcher* v. *Lew*, in which *Baille* v. *Bernales* (*c*) was referred to, and contended that it ought to appear on the defendant's affidavit that such a demand had been made, and that as it did not the defendant ought to pay the costs.

Sir *W. W. Follett*, contrà, contended, that in the cases cited, it appeared on the affidavits that no demand had been made, which it did not in the present;

(*a*) *Ante*, 278; 5 Dowl. P. C. 522.

(*b*) See *Broughton* v. *Jeremy*, 1 Har. & Wol. 525; *Gurney* v. *Key*, Id. 203; 3 Dowl. P. C. 559.

(*c*) 1 B. & Ald. 331; see also *Jones* v. *Jones*, 1 Dowl. P. C. 313; *Bohrs* v. *Sessions*, 2 Dowl. P. C. 710.

and that had the rule been drawn up with a stay of proceedings, it would have been necessary that the defendant's affidavit should state a previous demand had been made, but that not being the case it was unnecessary, and that therefore the plaintiff's affidavit should shew no demand had been made, if he wished to obtain the costs of the rule.

Cur. adv. vult.

LITTLEDALE, J., afterwards (Nov. 25th) gave judgment.—I find that there are conflicting opinions and conflicting decisions on this subject. In the case of *Fletcher* v. *Lew* (*a*), in the full Court, I said, that no demand having been made for security for costs before moving for it in Court, the rule was that the plaintiff should have the costs of the motion. I am willing to retract my opinion, whenever, on further consideration, I think I have come to a wrong conclusion, and in the present case I think that the rule is not as I then decided, but as is laid down by Baron *Parke*, in the case of *Fountain* v. *Steele* (*b*). That case is a subsequent case to that of *Fletcher* v. *Lew*. However, on principle, it seems to me that it is not necessary that a previous application should have been made to the plaintiff. Certainly it appears hard on a plaintiff to call him into Court on a rule like the present, unless he has been previously required to give security for costs. If when so called into Court he had said, you need not have served me with this rule, as I would have given security for costs had I been requested so to do, then the defendant would have had to pay the costs of the rule, because the plaintiff had always shewn himself ready to give the security. But in the present case the plaintiff has resisted this rule to his utmost, and having done that, and having shewn himself unwilling to give the security required, I think that the rule must be absolute in general terms.

Rule absolute accordingly.

(*a*) 3 Ad. & El. 551. (*b*) 5 Dowl. P. C. 331.

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If a plaintiff becomes bankrupt in the progress of a cause, application should be made to his assignees to know if the action is continued by them, before they are called on to find security for costs.

THIS cause was tried at the York spring assizes, 1836, and the plaintiff obtained a verdict, with liberty for the defendant to move to enter a nonsuit. The defendant in the next term obtained a rule nisi accordingly, which was still pending. Since that time the plaintiffs had become bankrupts, and assignees had been appointed; a rule was then obtained calling on the assignees to shew cause why they should not give security for costs. No previous application had been made to the assignees.

W. H. Watson shewed cause.—This rule cannot be supported. In ordinary cases application may be made for security for costs at any time before trial; and it is on the ground that the plaintiff is an actor and may put the defendant to costs which he is unable afterwards to pay; but in this case it is the defendant who is the actor, it is he alone who has to take any steps in the cause, and if he does nothing the plaintiff will be entitled to have judgment on the verdict which he has obtained. The application therefore in this case is made too late. Another reason why this application cannot be

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granted, is, that it does not appear on the affidavits that application has been made to know whether the cause is to be carried on for the benefit of the assignees.—[*Coleridge*, J.—If there is no affidavit that an application has been made to the assignees, or that the cause is to be carried on by them, is not this application premature?]

Hoggins, contrà.—It is submitted that it is not. The cases of *Mason* v. *Polhill* (*a*), *Doyle* v. *Anderson* (*b*), and *Bohrs* v. *Sessions* (*c*), are authorities for this application, and they shew that it may be made at any time before final judgment. It is necessary also that this application should be made as early as possible; and if it had not been made at the present time the case of *Mason* v. *Polhill* shews that it might perhaps be too late to make the motion at all. It is impossible for the defendant to swear as to whether the action is continued for the benefit of the assignees, or for the plaintiffs' own benefit. It should be stated on the other side how the bankrupts stand in regard to their assignees.

COLERIDGE, J.—This rule has not been moved for too late, but, on the contrary, too soon, having been moved for before the necessary steps were taken of knowing whether the assignees will give security for costs, or will have any thing to do with the action.

Rule discharged (*d*).

(*a*) 2 Dowl. P. C. 61.
(*b*) 2 Dowl. P. C. 596.
(*c*) 2 Dowl. P. C. 710.
(*d*) See the previous case.

The QUEEN *v.* The Justices of SALOP.

Since the passing of the Poor Law Amendment Act, an appeal against an order of removal may be made at the next sessions after the actual removal, and need not be made at the next sessions after the service of the notice of chargeability.

AN order of two justices was made on the 9th of February last, to remove a pauper from the parish of St. Mary, Shrewsbury, to the parish of Forden, in Montgomeryshire. The notice of the chargeability, together with a copy of the order of removal and of the examination of the pauper, was sent to the parish officers of Forden, as required by the stat. 4 & 5 *W.* 4, c. 76, s. 79, and was received by them on the 11th of February. There was then time, according to the practice of the sessions, to give notice of appeal for the next sessions, which were held on the 3d of April, but no notice was given, no appeal was entered, nor was any application made. On the 10th of April the pauper was removed pursuant to the order. On the 9th of June proper notice of appeal was given for the sessions, which were held on the 26th. It was then objected by the respondent parish, that the appeal was too late, and the Court being of that opinion refused to hear it. A rule having been obtained to shew cause why a mandamus should not issue, commanding the justices to enter continuances and hear the appeal;

Whateley shewed cause.—The decision of the Court of Quarter Sessions was right. The power of appeal against an order of removal is given, by the 13 & 14 *Car.* 2, c. 12, and it is necessary that the appeal should be made at the next sessions after the parish is aggrieved. Previous to the passing

of the New Poor Law Act, 4 & 5 *W.* 4, c. 76, it was held, that the parish was aggrieved by the removal of the pauper, and it was therefore necessary to make the appeal at the next sessions after the removal. By the 79th section of the late act, however, it is enacted, that the pauper shall not be removed until twenty-one days after notice of the chargeability is given, together with a copy of the order of removal, and of the examination of the pauper; and by the 84th section, the parish to which the pauper is removed is obliged, in case the removal takes place, to pay the expense of relief and maintenance from the time of sending that notice. It is submitted, therefore, that this appellant parish was aggrieved by the order of removal, and that therefore they ought to have appealed to the next sessions after they had notice of that order which were held on the 3d of April. The cases of *The King* v. *The Justices of Suffolk* (*a*) and *The King* v. *The Justices of Leicestershire* (*b*) will be relied on by the other side; but they do not decide this case. There the appeals were made to the next sessions, and the only question was, whether the appeal could be made at all, no notice of appeal having been given within the twenty-one days after the order was made; and it was held, that the appeal might be made, as the 79th section only enacted that the pauper was not to be *removed* for twenty-one days, but left the right of appeal as it was before. This case is similar to the case of a suspended order of removal under the stat. 49 *G.* 3, c. 124, s. 2, where the time of appeal is reckoned from the time of serving the suspended order, and that practice is also to be adopted in the present case. As the appellant parish became liable to pay the costs of the relief and maintenance of the pauper by the order of removal, it was aggrieved by that order, and should have prosecuted the appeal accordingly.

Alfred S. Dowling, contrà.—The decision of the Court of Quarter Sessions was wrong, as the appellant parish was not aggrieved until the 10th of April, when the pauper was removed. Under the former acts a parish was not aggrieved until the removal took place; and it has been decided by the two cases cited, that the new act has no effect in this respect, except to make the pauper irremovable for twenty-one days. The appellant parish therefore is aggrieved when the removal takes place as it was before the passing of the New Poor Law Act. It cannot be contended that the appellant parish was aggrieved, under the 84th section, by the order of removal being made, inasmuch as it is uncertain whether that parish will ever become liable under it to pay any expenses for the maintenance of the pauper. This not being a suspended order of removal, the law in such cases does not apply; besides, the 49 *G.* 3, c. 124, s. 2, contained an express enactment that the time for appealing shall be computed from the time of serving the order, and not from the time of removal.

It was then suggested that the decision of the Court in the case of *The King* v. *The Justices of Cornwall*, which was not reported, had decided this case also.

Cur. adv. vult.

LITTLEDALE, J., afterwards (Nov. 25th) gave judgment.—It seems to me that

(*a*) 1 Har. & Wol. 618; 4 Adol. & El. 319; 5 Nev. & Man. 503.

(*b*) 4 Dowl. P. C. 633.

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this is a clear case; and though the Court took time to consider their judgment in the case of *The King* v. *The Justices of Cornwall*, yet in this case I have no doubt, independently of that decision.—[His lordship then recited the facts of the case.]—Now as to the order of removal, the first act was the 13 & 14 *Car.* 2, c. 12, the first section of which provides that two justices may remove poor persons to their last legal settlement. The second section provides that all parties who think themselves aggrieved by the order of the justices, may appeal at the next sessions; and as it is by the removal that the parties are aggrieved, it has been held that the appeal must be made at the next sessions after the removal. It is not necessary to cite cases on that point, which has not been disputed in the argument on this case. It was however contended by the counsel who argued that the sessions had done right, that this is now altered by the Poor Law Amendment Act, 4 & 5 *W.* 4, c. 76. By the 79th section it is enacted, that no poor person shall be removed "until twenty-one days after a notice in writing of his being so chargeable or relieved, accompanied by a copy or counterpart of the order of removal of such person, and by a copy of the examination upon which such order was made, shall have been sent by post or otherwise, by the overseers or guardians of the parish obtaining such order, or any three or more of such guardians, to the overseers of the parish to whom such order shall be directed." Then follows a proviso in case the overseers agree to submit to the order, and also a proviso in case of a notice of appeal being given. By the 81st section it is enacted, that if a notice of appeal is given, a statement of the grounds of appeal must be given fourteen days before the sessions. And by the 84th it is enacted, "that the parish to which any poor person, whose settlement shall be in question at the time of granting relief, shall be admitted or finally adjudged to belong, shall be chargeable with and liable to pay the cost and expense of the relief and maintenance of such poor person, and such cost and expense may be recovered against such parish in the same manner as any penalties or forfeitures are by this act recoverable; provided always, that such parish, if not the parish granting such relief, shall pay to the parish by which such relief shall be granted, the cost and expense of such relief and maintenance from such time only as notice of such poor person having become chargeable shall have been sent by such relieving parish to the parish to which such poor person shall be so admitted or finally adjudged to belong." Mr. *Whateley* contended on those sections, that the parish was aggrieved by the order of removal and copy of the examination being sent; and that although no actual grievance is thereby sustained, yet inasmuch as the parish may become liable, by what takes place afterwards, to certain expenses from the time the order is sent, that is to be considered as the time when the parish is aggrieved. I own I think that that is not so, as the Poor Law Amendment Act does not make any difference in the law as to when a parish is aggrieved. It is aggrieved by having to pay money for providing for the relief and maintenance, and it is not by the possibility of incurring some expense, which is a mere contingency, that it is aggrieved. That is my opinion; but if I had any doubt on the subject, the case of *The King* v. *The Justices of Cornwall*, which was argued in Easter term last, and judgment given in Trinity term, has decided the point. The facts of that case are precisely the same as the present. There the copy of the order and examination were served in June, and so early that he might have appealed to the Midsummer sessions; the

pauper was removed the day after those sessions, and the appeal was made at the October sessions. So here, the copy of the examination and order of removal were sent on the 11th of February, in time to have made the appeal at the April sessions; nothing was done at those sessions; the pauper was then removed, and the appeal was made to the next Midsummer sessions. The cases therefore are exactly parallel. The Court took time to consider their judgment in that case, and held that the appeal was made in time. I am of opinion therefore that the parish was not aggrieved until the actual removal, and that although it may become liable to expenses from some antecedent time, yet that does not make any difference. The time of removal is the time when the parish is aggrieved, and therefore this rule must be made absolute.

Rule absolute.

PRIOR *v.* BINNS.

A second continued notice of executing a writ of inquiry, which does not mention hour and place, nor refer to the first notice, cannot operate as a good new notice, though given eight days before the day mentioned.

THIS was a rule to shew cause why the execution of a writ of inquiry and the subsequent proceedings should not be set aside with costs, and why the defendant should not be discharged out of custody as to this action, and why the plaintiff should not pay the costs of this rule. Judgment had been suffered by default, and a good notice of the execution of the writ of inquiry, mentioning the hour and place, was given on the 13th of June for the 22d. Before the 22d this notice was continued to a still later day; and in the same way six other notices of continuance were given. The last was given on the 22d of July, and was in this form: "I hereby continue the notice of executing the writ of inquiry in this case until the 1st day of August next." On the 31st of July the defendant's attorney gave notice that he should not attend the next day, but the plaintiff's attorney, notwithstanding, proceeded in the inquiry, and obtained a verdict for 80*l.* A summons was afterwards taken out to set aside this execution of the writ of inquiry, but the application was dismissed by *Williams*, J., and the defendant had since been charged in execution.

Ogle shewed cause.—It is contended on the other side, that according to the usual practice there can be but one continuation of the notice of inquiry; and that consequently the notice given on the 22d of July was a bad notice. But even allowing that to be the practice, still the notice given on the 22d of July is a good notice, as it has the effect of a new notice, there having been eight days between the time it was given and the day on which it was to be executed, which is the time required by the practice of the Court. The case of *Tyte* v. *Steventon* (*a*), shews that a continuance of a void notice of trial may operate as a good new notice, and so in this case continuance of a good notice of inquiry may undoubtedly operate as a good new notice.

Wallinger, contrà.—The cases of *Price* v. *Bambridge* (*b*) and *Burgess* v. *Boyd* (*c*), which are referred to in *Tidd's Practice* (*d*), shew that all the notices

(*a*) 2 Black. 1298; see also *Ranger* v. *Bligh*, and *Fell* v. *Tyne*, 2 Har. & Wol. 299.
(*b*) Barnes, 297.
(*c*) 2 Chit. 220.
(*d*) P. 580, 9th edit.

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LEFEVRE v. WRIGHT.

posing that to be so, it is no ground for this process against the defendant being set aside, though it may perhaps be a defence to the actions for the escape.

Petersdorff, contrà.—This writ of capias is void on two grounds; first, because it issued against a practising attorney; and secondly, because the party being confined within the rules of the Queen's Bench Prison ought to have been proceeded against by writ of detainer, and not by capias. The Uniformity of Process Act, 2 & 3 *Will.* 4, c. 39, s. 8, is evidently from its language intended to apply to persons living within the rules, as well as to persons in actual custody within the walls of a prison; and it is submitted that it was the intention of the legislature by that enactment to direct that proceedings in such cases should be by writ of detainer only.—[*Coleridge*, J.—But this defendant was out of the rules when taken.]—He was but a very short distance beyond, and it will be placing the marshal in great difficulty if the Court allows a person to be arrested when there is such a trifling escape.—[*Coleridge*, J.—That is the very thing the marshal takes security against.]—There is also another difficulty which the other side has to contend with, namely, that it should be shewn that the defendant was out of the rules at the time the capias issued, and it is not sufficient to shew that he was out when taken into custody. It is also shewn on the affidavits that there was collusion on the part of the plaintiff, which of itself is ground for making this rule absolute. Supposing that this capias is not a nullity on account of it having issued against a practising attorney, still it is not such a mere technical irregularity as would authorize a judge at chambers to interfere, and the Court will not in such a case allow the time that has elapsed to preclude an attorney from having the privilege which he is entitled to.

COLERIDGE, J.—There are several grounds on which this rule is moved. The first is, that the defendant is privileged as a practising attorney, and that improper proceedings have been taken against him by arresting him on a capias. It is not necessary to inquire whether he is a practising attorney or not, and whether, by practising while in custody, he ceases to have his privilege as a practising attorney, though I think it would be taking a strong position to hold that opinion. I think the case must be put on the ground that there has not been more than a mere irregularity, and then the question of the time when this application was made is let in. When I see that this arrest was on the 26th of August, and that nothing was done to discharge the defendant until the 3d of November, I must hold on all the decided cases, that the application was made too late. But then it is next said that the time is out of the question, the proceedings being a mere nullity, as by the Uniformity of Process Act it is an illegality to proceed by writ of capias, that act having in effect directed, that where a party is in custody the process is not to be by writ of capias, but by writ of detainer. Now I must consider who it is that is making this application; it is the defendant, *Wright:* I must also consider the circumstances of the case; he was confined within the rules of the Queen's Bench Prison, and it appears he was in the habit of continually breaking the rules. Under such circumstances I cannot think the proceedings by capias were a nullity. The plaintiff need not necessarily have known that the defendant was living within the rules, he may not have known where to find

him, and therefore took out a capias. But it is said that it must depend on where the defendant was at the time the writ issued, not on where he was when the writ was used. I think that if I were to decide according to that argument I should be laying down an impracticable course of proceeding. All that the Uniformity of Process Act directs is, that if a party wants to arrest another he must proceed by writ of capias, but if he wants to detain him he must proceed by writ of detainer. This proceeding, therefore, is not a nullity. Next, on the facts of the case, it is stated that there is collusion, and in this way; the defendant was in custody for the amount of two of the bills; (I do not inquire who were the plaintiffs in those actions,) then this arrest was for the third, and the holder of it was the attorney for the plaintiffs in the former actions; and it is stated that the object was to take the defendant into custody, and then to commence proceedings against the marshal for the escape. Now I ask with whom was this plaintiff in collusion? was it with the plaintiffs in the former actions? The attorney certainly had a right to take proceedings on this bill. I decide nothing as to the actions against the marshal, all I decide is as to the right of the defendant to his discharge under this rule. If the marshal has been improperly sued he may make an application to the Court, but that will not entitle this defendant, *Wright*, to his discharge. I think, therefore, that he has not made out his case on any one ground, and this rule must therefore be discharged with costs.

Rule discharged with costs.

FERGUSON *v.* MAHON.

BALLANTYNE shewed cause against a rule for discharging the defendant out of custody for irregularity in the affidavit to hold to bail. The affidavit was sworn before a commissioner in Ireland, but was not intituled in any Court. The jurat was, "sworn before me, *J. H.*, a commissioner of Her Majesty's Courts of Queen's Bench, Common Pleas, and Exchequer, for taking affidavits in Ireland." He cited the case of *White* v. *Irving* (*a*) as a case precisely in point, to shew that this was sufficient.

An affidavit of debt, not intituled in any Court, the jurat of which stated it to be sworn before a commissioner of the Courts of Queen's Bench, Common Pleas, and Exchequer, is sufficient.

Humfrey, contrà, contended that the affidavit was insufficient, and that in the case cited the rule of H. T. 2 *Will.* 4, I. 4, (*b*) was not adverted to.

LITTLEDALE, J.—I think that the affidavit is sufficient (*c*).

Other objections to the affidavit were then argued.

(*a*) 2 Gale, 230; 5 Dowl. P. C. 289.
(*b*) 1 Dowl. P. C. 184.
(*c*) See *Urquhart* v. *Dick*, 3 Dowl. P. C. 17; and *The Kennett and Avon Canal Company* v. *Jones*, 7 T. R. 451.

DOE *d.* GOWLAND *v.* ROE.

BUTT moved for the landlord's rule requiring the tenant to enter into recognizances, under the statute 1 *Geo.* 4, c. 87, s. 1, on the usual

On moving for the landlord's rule, under the statute 1 *Geo.* 4, c. 87, s. 1, the execution of the lease was allowed to be sworn to by a person who was present at the execution, but was not the attesting witness.

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affidavits, except that the affidavit, verifying the execution of the lease by the tenant, was not made by the attesting witness, who was unwilling to make it. Another person, however, now made an affidavit that he saw the lease executed. It was submitted that the words of the statute, 1 *Geo.* 4, c. 87, s. 1, being that this rule might be granted upon producing the lease, and on "proving the execution of the same by affidavit," it was not necessary that the affidavit of the attesting witness should be produced under the circumstances of the case, and that the affidavit of the other person who saw it executed was sufficient. The case of *Mayor* v. *Rotheram* (*a*) was cited.

LITTLEDALE, J., after conferring with the officer of the Court, granted the rule.

Rule granted (*b*).

(*a*) 1 Gale, 157; 3 Dowl. P. C. 690.
(*b*) But see *Doe* d. *Avery* v. *Roe*, 1 Will. Wol. & Hod. 178.

DOE *d.* WILSON *v.* ROE.

It is not material if a declaration in ejectment is intituled of a term which has not yet arrived.

GUNNING moved for judgment against the casual ejector. The declaration was intituled in Trinity term, in the first year of *Victoria*, a term which had not yet arrived. The notice had no date, but required the tenant to appear "in next Michaelmas term," and had been served in October last. It was submitted that the tenant could not be misled, and the case of *Doe* v. *Roe* (*c*) and the case there cited were referred to.

LITTLEDALE, J.—I understand that there are several other declarations similarly intituled, application must, therefore, be made to the full Court. It is rather against my opinion to allow this rule to be granted, as I think it introduces a laxity of practice.

Gunning afterwards renewed his motion in the full Court (*d*) and obtained the rule (*e*).

Several similar applications were subsequently made in this Court, and rules granted.

(*c*) 2 Dowl. P. C. 186.
(*d*) Before Lord *Denman*, C. J., and *Patteson*, *Williams*, and *Coleridge*, Js.
(*e*) See *Doe* d. *Wills* v. *Roe*, *ante*, 76, and *Doe* d. *Symes* v. *Roe*, *ante*, 391.

DOE *d.* DAVIS *v.* ROE.

Judgment against the casual ejector granted, the notice having been to appear in the King's Bench, the Court having since become the Queen's Bench, by the demise of the crown.

LOCKE moved for judgment against the casual ejector. The notice at the foot of the declaration, which was served on the 14th of June, during the life of the late King, required the tenant to appear in Michaelmas term next in the Court of King's Bench. The Court having now become the Court of Queen's Bench, the officer of the Court had refused to grant the

rule in the ordinary way, as the tenant might perhaps not be bound to appear in this Court. This refusal rendered this special application necessary.

LITTLEDALE, J., granted the rule.

Rule absolute.

DOE *d.* MULLER *v.* ROE.

GURNEY moved for judgment against the casual ejector. The declaration stated two demises, each of which was by two persons, and the affidavit of service was intituled "*John Doe* on the demise of *A*, *B*, *C*, and *D*, &c." without distinguishing which two were joined together in the demises. It was submitted that the affidavit was properly intituled.

The affidavit on which judgment against the casual ejector is moved need not distinguish how the demises are stated in the declaration, so long as all the names of the lessors are inserted.

LITTLEDALE, J.—I think that it is sufficient. Suppose there were four persons, and a demise was first stated by the four, then by three of them, then by two, and then by one, it could not be necessary to distinguish and follow these several demises in the affidavit, so long as all the names are inserted.

Rule absolute.

DOE *d.* COWAN *v.* ROE.

STAMMERS moved for a rule to shew cause why a special service of a declaration in ejectment should not be a good service on the tenant in possession, Mrs. *Philpot*, and submitted that he was entitled to the rule, though it was not known what was her Christian name. The affidavit on which he moved stated the unsuccessful inquiries that had been made to discover the name.

Rule to shew cause why a service in ejectment should not be deemed good, though the Christian name of the tenant could not be discovered.

LITTLEDALE, J.—The rule may be granted though the Christian name is not known.

Rule nisi granted.

DOE *d.* JONES *v.* ROE.

R. V. RICHARDS moved for a rule for judgment against the casual ejector. The affidavit stated, that on the 26th of October the declaration and notice were inclosed in a letter to the tenant in possession, *Edward Powell*, and that the deponent went to the house, where he saw the daughter of the tenant, who said her father was not at home, and that she did not know when he would be. She was told what the letter contained, and a copy was also fixed on the door of the house. Another call was made on the 28th, and the same daughter said that the letter had not been sent to her father, and when requested that it should be, she said "very well." On a third call the daughter said it had been sent. Another deponent stated

Rule nisi granted for judgment against the casual ejector, where there had been service on the daughter of the tenant in possession who was stated to be in a mad-house, but who was supposed to be keeping out of the way.

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that he had often requested to see the tenant, but that his wife had said that he was in a mad-house, but would not state where. It was also sworn that the wife conducted the affairs of her husband, and that it was believed that in fact he was keeping out of the way of his creditors. It was submitted, that if in fact the tenant was in a lunatic asylum, the case of *Doe* d. *Wright* v. *Roe* (*a*), cited in *Adams'* Ejectment, shewed that there had been a sufficient service, but that if not, then, under the circumstances of the case, sufficient had been done for the Court to grant a rule nisi.

LITTLEDALE, J.—I think that a rule nisi may be granted, and it must be served on the daughter, on the wife, and by sticking it upon the premises and in the Queen's Bench Office.

Rule nisi granted.

(*a*) Barnes, 190.

Ex parte ANDERDON.

An attorney cannot be called on summarily to make good the value of an annuity, which he had lost through his neglect.

ROBERTS moved for a rule calling on an attorney to shew cause why he should not make good the value of an annuity which had been lost through his neglect. The affidavits on which he moved also shewed fraud and collusion.

LITTLEDALE, J.—I never before heard of such a motion. If however a case is made out for answering the matters of the affidavit a rule may be granted for that purpose.

A rule nisi was then granted, calling on the attorney to answer the matters of the affidavit.

BLURTON *v.* FOWELL.

A distringas for the purpose of proceeding to outlawry may be granted, though no calls at the defendant's last place of residence have been made, if it is known that he has settled abroad.

R. V. RICHARDS applied for a distringas for the purpose of proceeding to outlawry. The writ of summons was issued on the 21st of October, but the defendant had previously gone to America to settle there, and as long ago as August last a letter had been received from him from that country. It was submitted, that it was impossible in this case to make the usual calls as in cases where the distringas was to compel an appearance, as the defendant had no residence at all in this country. The case of *Grindley* v. *Thorn* (*b*) was referred to.

LITTLEDALE, J.—I have great doubt whether I ought to grant a distringas,

(*b*) 5 Dowl. P. C. 383, 544. *S. C.* nom. *Close* v. *Parker*, Wil. Wol. & Dav. 71, 208; see also *Harding* v. *Manners*, 2 Har. & Wol. 80; and *Fay* v. *Daw*, 5 Dowl. P. C. 310.

notwithstanding the case referred to. I shall take time to consider the question.

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BLURTON v. FOWELL.

Cur. adv. vult.

LITTLEDALE, J., afterwards (Nov. 7th) granted the distringas.

BELT's Bail.

MANSEL opposed these bail, and submitted that there ought to be the usual deposit of the costs of opposing a former attempt to justify, before the bail were examined, there having been already two notices of justification.

It is not too late, after bail are sworn, to object that the costs of a former opposition have not been deposited.

C. C. Jones, contrà, submitted, on the authority of *Knight's* bail (*a*), that the objection was too late, the bail having already been sworn.

Mansel submitted, that the bail were sworn as a matter of course by the officer of the Court before there was time to make the objection, and that the case cited had been overruled in the Court of Exchequer.

LITTLEDALE, J.—I think that the objection is not made too late, as the bail are sworn as a matter of course. I am glad to find that the case cited has been overruled, as I should have felt a difficulty in acting upon it.

The deposit was then made, and the bail were allowed.

(*a*) 1 Hodges, 370; 4 Dowl. P. C. 328.

Ex parte GRADDON.

ALFRED S. DOWLING moved for leave to enter the certificate of an attorney, nunc pro tunc, in the Master's book. The attorney had taken out his usual certificate in the year 1836, but had omitted by accident to enter it in the Master's book. This was not discovered until he went to enter his certificate in the present year.

Leave granted to enter, nunc pro tunc, in the Master's book, the certificate of an attorney, which had been accidentally omitted.

LITTLEDALE, J., granted the application.

VINER *v.* COOPER and two others.

CROMPTON obtained a rule to set aside a declaration for irregularity, a capias having issued against three persons, two of whom had been arrested and given bail, and the plaintiff having declared against those two only (*b*).

If a plaintiff sues out a writ of capias against several persons, he must declare against them all.

(*b*) Reg. Gen. M. T. 3 W. 4, s. 1; 1 Dowl. P. C. 470.

Bail Court.

VINER v. COOPER and others.

Wightman shewed cause, and contended, that it was not irregular, and referred to the rule M. 3 *W.* 4, s. 11. (*a*)

LITTLEDALE, J.—I am not aware of any case to support this declaration. This rule must be absolute.

Rule absolute.

(*a*) 1 Dowl. P. C. 473.

TODD v. GOMPERTZ.

On enlarging a rule on the last day of term, the Court will allow it to be made a part of the rule that there should be a stay of proceedings.

ALFRED S. DOWLING, on the last day of term, on a motion to enlarge a rule which he had obtained to shew cause why the judgment which had been signed, and fieri facias which had issued on a warrant of attorney, should not be set aside, and why the warrant of attorney should not be delivered up to be cancelled, requested that there should be in the meantime a stay of proceedings.

Godson, who moved to enlarge the rule, contended, that as it was the last day of term there could not be a stay of proceedings (*b*).

LITTLEDALE, J.—I understand that, according to the usual practice, it may be allowed. It might in this case have been made part of the original rule, that there should be a stay of proceedings; and now, as both parties appear, it may be made part of the rule on enlarging it.

Rule enlarged accordingly.

(*b*) Tidd Prac. 498, 9th edit.

Queen's Bench.

BRICKILL *v.* HULSE.

In trover against the sheriff for taking the goods of the plaintiff, an affidavit made by one *W.*, and employed by the under-sheriff in an application by him under the Interpleader Act, is admissible as evidence for the plaintiff to prove that *W.* was the agent of the sheriff, and that the sheriff, by *W.*, had seized the goods.

TROVER against the defendant, as sheriff of Southampton. The defendant brought 20*l.* into Court, and pleaded that the plaintiff had not sustained greater damages. Replication, damages ultra.

At the trial at the summer assizes for Hants before *Tindal*, C. J., it appeared that on the 1st June 1836, a fieri facias had issued against one *Wyatt*, under which a warrant was sent to *White*, a sheriff's officer, who levied and put a man in possession.

On the 7th June, one *Wade* gave the officer, *White*, a bill of sale relating to the goods seized, which had been executed by *Wyatt* in February 1835, and requested him to hold possession of the goods under it, which he undertook to do, and placed the bill of sale in the hands of the man in possession. On the 11th and 15th June *White* levied under two other writs, and put the same man in possession.

On the 21st June the plaintiff, who claimed the goods under a bill of sale

of July 1834, gave the defendant notice not to sell, and required him to withdraw from possession, and he also put a man in possession on his own behalf. Shortly afterwards, the defendant being ruled to return one of the writs, the under-sheriff forwarded to London affidavits by himself and by *White* the officer, in order that an application might be made under the Interpleader Act; and an order was obtained from a judge at chambers, extending the time for the return till the end of the first four days of the next term.

On the 9th August *Wade* paid to the under-sheriff the amount of the three executions, and upon that was allowed to sell the goods; upon which the plaintiff brought an action of trover against *Wade* and also the present action. A judge's order was obtained for a stay of proceedings in the present action till after the determination of the other, the defendant undertaking to be bound by the verdict in that case as to the right to the goods. The plaintiff obtained a verdict against *Wade* for the amount of the sale.

In opening the case, the counsel for the plaintiff stated, that *White* the sheriff's officer had colluded with *Wade*, and had kept such incautious custody of the goods that *Wade* was enabled to carry off part of them. The counsel for the defendant submitted that this was not in issue in the present action; but the learned Chief Justice was of a different opinion, and overruled the objection. During the trial, *White* the sheriff's officer was present in Court, but was not called; and the only evidence of possession by the defendant was the affidavit made by *White* and employed by the under-sheriff in the application under the Interpleader Act. This evidence was objected to by the defendant, but was admitted by the learned judge, who gave the defendant leave to move to enter a nonsuit. Verdict for the plaintiff.

Erle now moved for a new trial or to enter a nonsuit. (As to the first part of the application the Court intimated their desire to speak with the Chief Justice of the Common Pleas respecting it.) This affidavit was not admissible in evidence, it is analogous to a deposition in Chancery. And depositions cannot be used by a stranger against the party to the suit by whom they are employed; 1 *Phil. Ev.* c. 4, s. 1, citing *Rushworth* v. *The Countess of Pembroke* (*a*); nor when the witness can himself be produced; *Benson* v. *Olive* (*b*). At all events the affidavit was not admissible unless it had been shown aliunde that *White* was the agent of the sheriff.

Lord DENMAN, C. J.—I have no doubt whatever but that this statement, whether it be considered as an affidavit or not, is admissible as evidence in this case. I see nothing whatever to distinguish it from any statement made by the sheriff himself. And there is nothing in any of the cases which induces me to form a different opinion. *Rushworth* v. *The Countess of Pembroke* is the only one which seemed at first to raise some difficulty. But that exists in appearance only, and when the nature of the proceedings in Chancery is considered even that appearance is removed. In Chancery, the party on whose behalf depositions are employed has no means of knowing previously all that they may contain. If he had, and still deliberately chose to employ them, the rule would be different. But in fact, all that he does is to tender a person as a witness. That person is then examined by the master

(*a*) Hardres, 472.

(*b*) 2 Stra. 920; and see Stark. 102, tit. "Proof of Depositions," and "Depositions."

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and his depositions are taken down. The party therefore to the suit in Chancery stands with respect to these depositions precisely in the same relation as a party to a suit at common law does to the evidence given by a witness whom he has called. Now as to that, it has long been well established that a party is not to be bound by all the statements of a witness whom he has chosen to call. The case cited therefore merely establishes that the rule of evidence observed in the Courts of Common Law prevails also in Courts of Equity. It contains nothing which goes to show that this affidavit is not admissible; nor is there any ground for excluding it. It was produced by a party who, knowing all its contents, adopted and used them deliberately for his own purposes; can there be any doubt then that this is evidence against that party?

PATTESON, J.—I am of the same opinion. We must take it for granted that the application under the Interpleader Act was made by the party who is virtually defendant in this action. There is no doubt that in point of interest the parties are identical. The affidavit then is an authorized statement made in truth by the defendant in the present action. How then can it be contended that it is not admissible as evidence against him? It is quite clear that it was a document deliberately produced by him for his own particular purposes.

WILLIAMS, J.—I think that this affidavit stands on precisely the same footing as if it had been a statement made by the sheriff himself. There is no doubt that any thing said by him would be evidence, and when he employed this affidavit for the purpose of obtaining the object which he had in view on applying to the judge, it became in fact a statement made by him as much as if it had proceeded out of his own mouth.

COLERIDGE, J.—No difficulty exists as to the principle of this case, and the doubt created by the case in *Hardres* is removed as soon as we look at the facts. The sheriff himself comes before the judge armed with this very statement, he uses it for his own purposes and adopts it deliberately throughout. According to all principle therefore it may be used as evidence against him.

No doubt the circumstance that the officer who made this affidavit was in Court and uncalled, is open to remark. But we are now only on the question of admissibility.

With regard to depositions in Chancery, they are in truth the same things as the evidence of a witness in open Court. And if the party to a cause is not tied down to every statement made by every one of his witnesses, neither is the party to a suit in Chancery tied down to every statement contained in the depositions of his witnesses. This affidavit is on quite a different footing.

Subsequently, (Nov. 22nd,) the Court intimated their opinion that the learned Chief Justice of the Common Pleas had not misdirected the jury, as there was evidence that the officer had concurred in the acts of conversion by *Wade*.

Rule refused.

TOD *v.* JEFFERY.

After a rule has been made absolute in the Bail Court, the Court of Q. B., sitting in Banc, has no power to allow it to be re-opened and discussed, even although the judge who disposed of it has sanctioned an application for that purpose.

THIS case was tried before the sheriff of Northamptonshire, when a verdict was found for the plaintiff, with leave to move to enter a nonsuit, on the ground that evidence had been improperly received.

In Easter term, 1836, a rule nisi was obtained accordingly before *Littledale*, J. in the Bail Court, and in Trinity term following, it was, upon argument before *Coleridge*, J. in the same Court, made absolute. Judgment was signed and the costs were taxed thereon.

In Michaelmas term, an application was made to *Coleridge*, J. then sitting in the Bail Court, to allow the rule to be re-opened and discussed before the four judges sitting in Banc. His lordship stated, that he did not object to that being done, and *Wightman* obtained a rule nisi accordingly, against which,

Sir *W. W. Follett* and *Butt* now shewed cause.—The stat. 1 *Will.* 4, c. 70, s. 1, which gives authority to a single judge to sit and dispatch business apart from the other judges, provides that what is done by him shall be done "in the same manner, and with the same force and validity as may be done by the Court sitting in Banc." A judgment, therefore, in the Bail Court stands *upon* precisely the same footing as one pronounced in Banc, and is not subject to review in this Court. The authorities, also, shew that it has been so considered, *Rex* v. *The Sheriff of Devon* (*a*), *Rosset* v. *Hartley* (*b*).

Cresswell and *Wightman*, contrà.—This is an application to the discretion of the Court, made under the sanction of the judge who decided the case. That discretion is acted upon even as regards rules obtained before the Court in Banc; *De Rütsen* v. *Lloyd* (*c*). There can be no reason why a greater strictness should obtain, as to rules obtained before a single judge. In *Rex* v. *The Sheriff of Devon* (*a*), the application was in invitum, *Patteson*, J. having absolutely refused to allow the rule to be re-opened.

Lord DENMAN, C. J.—I am of opinion that we must to all intents and purposes consider a decision of the Bail Court on the same footing as one proceeding from this Court. No doubt, under certain circumstances, where there has been a plain misconception of the facts, this Court may be induced to interfere for the purpose of re-opening a rule, especially in cases of motions for a new trial or leave to enter a nonsuit; which motions are always considered to be in some sort under protection of the equity of the Court. But where a judge sitting in the Bail Court has already, after a full discussion of all the facts, made a rule absolute, we think that we have not any power to sit as a kind of Court of appeal from his decision. Nor would even a direct expression of the opinion or wishes of the judge himself to that effect at all justify us in assuming a power so opposed to the general convenience.

PATTESON, J.—I think that it is not only expedient, but also, that we are under a necessity to come to this conclusion; the act of parliament provides,

(*a*) 2 Ad. & El. 296. (*b*) 1 Har. & Wol. 581. (*c*) 5 Ad. & El. 466.

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"that it shall and may be lawful for any one of the judges of either of the Courts, when occasion shall so require, while the other judges of the same Court are sitting in Banc, to sit apart from them for the business of adding and justifying special bail, discharging insolvent debtors, administering oaths, receiving declarations required by statute, hearing and deciding upon matters on motion, and making rules and orders in causes and business depending in the Court to which such judge shall belong, in the same manner and with the same force and validity as may be done by the Court sitting in Banc."

We, therefore, are absolutely bound to deal with a rule made in the Bail Court in the same way in all respects as if made in this. Now, if a rule be made absolute in this Court during one term, it cannot be altered in another. With respect to the distinction taken between the present case and *Rex* v. *The Sheriff of Devon*, I was there averse to have the case brought forward again, because I felt assured that I should arrive at the same conclusion; as would naturally be the case upon the same facts being brought forward. Moreover, I think that we have not the power to allow rules to be redisposed of, even upon the permission and by the desire of the learned judge who has before disposed of them, and it is much better for all parties concerned that nothing of the kind should ever be done.

WILLIAMS and COLERIDGE, Js. concurred.

Rule discharged.

DOE *d.* ELLIS *v.* HARDY.

A copy, certified according to 7 *G.* 4, c. 57, s. 76, of an assignment to the provisional assignee, made under 1 *G.* 4, c. 119, is admissible in evidence, without proof that the insolvent was adjudged to be entitled to his discharge.

EJECTMENT tried before *Littledale*, J. at the Dorchester spring assizes, 1836.

After the close of the plaintiff's case, the defendant offered in evidence an office copy of an assignment made by the lessor of the plaintiff, on the 11th May, 1822, to the provisional assignee of the Insolvent Court, certified by the provisional assignee and duly sealed, and also office copies of his petition and schedule, certified and sealed by the deputy of the chief clerk. The witness producing them stated, that if the petition had been dismissed, the schedule would have been in Court, and that the word "dismissed" would have been written in large characters across the petition and schedule, and that when he examined them no such words were there. The evidence was objected to by the counsel for the lessor of the plaintiff, and rejected by the learned judge who gave leave to move to enter a nonsuit; and a rule having been obtained accordingly,

Erle now shewed cause.—The alleged insolvency took place in 1822. At that time 1 *Geo.* 4, c. 119, was in operation. The original assignment therefore ought to have been produced; and no copy, however authenticated, could be received in evidence. Section 7 of that act provides, certainly, that the assignment shall be entered on the proceedings of the Court, and that an office copy shall be evidence thereof; but that is only when the Court "shall adjudge any prisoner to be entitled to his discharge." Now there is nothing in this case to shew that the prisoner ever was adjudged to be entitled to his

discharge; there is no evidence of any such adjudication. The original assignment ought therefore to have been produced. It is true that by 7 *Geo.* 4, c. 57, s. 76, copies may be given in evidence of "proceedings made and had in the matter of a prisoner's petition." But that enactment can only refer to the proceedings which were, under 1 *Geo.* 4, c. 119, provable by copies. In this case what had been done had never arrived at that point when the provisions of 7 *Geo.* 4, could operate upon them. The proceedings were only ad interim and occasional; until the discharge the assignment in question was an imperfect instrument. The presumption here is, that *Ellis* had applied to the Court and had been remanded, and never had obtained a discharge. The proceedings here were therefore only inchoate, and not admissible in proof by copies. *Doe* d. *Phillips* v. *Evans* (*a*), does not affect the present argument; there it was proved that the party had been discharged; in that case, therefore, there could be no question but that a copy was admissible.

Butt and *Fitzherbert*, contrà, were stopped by the Court.

Lord Denman, C. J.—I think that the assignment in question was clearly a proceeding within the meaning of 7 *Geo.* 4, c. 57, s. 76. We are not to assume that any thing was left undone which was necessary to be done for the completion of that proceeding. The title of *Ellis* was to be made out by the lessor of the plaintiff, and if it be shewn that he is divested of that title, the plaintiff cannot recover. The assignment to the provisional assignee under 1 *Geo.* 4, took place as part of the ordinary proceedings in the Insolvent Court. I think we are not to make any intendment at all against the completion of such proceedings. The 7 *Geo.* 4, c. 57, s. 76, makes a copy of such proceedings admissible as evidence of them; and in order to give due effect to that provision, we must consider it as applicable in the present case.

Patteson, J.—I am of the same opinion. The question is one of evidence merely. It must be admitted that the original assignment did pass the estate, and it cannot be argued that any thing had occurred by which the provisional assignee was divested of it. I think 1 *Geo.* 4, c. 119, s. 7, does not bear any such construction as is contended for. It cannot be said that the provisional assignment is without effect, on the contrary, the words of that section clearly shew that every assignment, whether provisional or otherwise, is to be considered as part of the proceedings of the Court. If so, then under 7 *Geo.* 4, c. 57, s. 76, a copy of them is admissible in evidence.

Williams, J.—I think there is no reason to require proof that the proceeding was final. This assignment certainly was a proceeding under the former act. It is continued as such under the latter. Whether or not, therefore, any thing further remained to be done, seems to me an inquiry of no consequence, because in either case the proper proof of it was offered.

Coleridge, J. concurred.

Rule absolute (*b*).

(*a*) 1 C. & M. 450.

(*b*) See *Doe* d. *Threlfall* v. *Sellers*, *ante*, 160.

Queen's Bench.

FILLIEUL *v.* ARMSTRONG.

Assumpsit for salary. The declaration stated a contract by which the defendant retained the plaintiff as teacher in his school for a year. Breach, that the defendant did not allow the plaintiff to continue &c. Plea, that the plaintiff promised the defendant not to absent himself from the school; that he did absent himself for an unreasonable time, to wit, two days; wherefore the plaintiff discharged him. Replication, that after the absence the plaintiff returned, and continued until his discharge. After verdict for the defendant the Court *held*, that the plea amounted to a confession and an insufficient avoidance, and allowed judgment to be entered for the plaintiff, non obstante veredicto.

ASSUMPSIT. The first count of the declaration stated, that heretofore, to wit, the 24th February, 1835, in consideration that the plaintiff would enter into the employ of the defendant, as teacher of the French language and drawing, in a school of the defendant's, for one whole year, at a salary &c., the defendant promised &c. That the defendant entered into the employ and was willing to continue &c. Breach, that the defendant wrongfully refused to allow the plaintiff to continue &c; second count, for work and labour.

Pleas. First, non assumpsit, on which issue was joined; second, as to the first count, that before and when the defendant made the promise mentioned, the plaintiff in consideration &c. promised the defendant diligently and faithfully to serve the defendant in the said capacity of teacher at the said school, and not to absent himself without sufficient cause, except during the vacations, in consideration whereof the defendant retained the plaintiff as mentioned, and was always willing to continue the plaintiff for the period and on the terms mentioned, until the plaintiff misconducted himself, as hereinafter mentioned, and that after the promise &c. and before the discharge &c., to wit, &c., a certain vacation was appointed, to wit, &c. &c., and that on a certain day, to wit, the 30th of January, 1836, it was appointed that the school should recommence &c., whereof the defendant had notice; and that the defendant was absent from the school during the vacation, and it became his duty to return and resume his duties as teacher on the 30th January; and although divers pupils did then return and the school then recommenced, as the plaintiff well knew, yet the plaintiff not regarding &c. did not return &c., but wrongfully absented himself &c. for an unreasonable period, to wit, for two days, without any sufficient cause &c., whereby the defendant was greatly delayed and injured in respect of divers matters wherein he would have employed the defendant in his said capacity, and was forced to endeavour to procure another person to serve him in the capacity aforesaid in place of the plaintiff, and thereupon it became lawful, necessary and expedient for the defendant to discharge the plaintiff from his employ as such teacher. Wherefore the defendant did afterwards refuse to employ the plaintiff in his employ as such teacher, and discharged him therefrom, which is the supposed breach of promise mentioned. Verification, &c.

The replication stated that, after the absence mentioned and before the defendant discharged the plaintiff, the plaintiff returned to the employ of the defendant, and continued in that employ, on the terms mentioned, until the defendant discharged him as aforesaid. Verification, and issue joined.

At the trial before Lord *Denman*, C. J., at the sittings after Easter term, the jury at first found a verdict on the first issue for the *defendant*, damages 15*l.*, on the second issue for the defendant, but afterwards they found a general verdict for the defendant. A rule nisi having been obtained on behalf of the plaintiff for judgment non obstante veredicto on the second issue,

Gurney now shewed cause.—This plea shews a sufficient answer to the

action. It appears by it that the plaintiff himself put an end to this contract by absenting himself from the school. The replication admits the unreasonableness of the absence. If the plaintiff might absent himself for two days without repudiating the contract, he might do so for the whole time of his engagement. The consequence might be the destruction of the school; the absence therefore goes to the essence of the contract. In *Winstone* v. *Linn* (*a*) such a plea was certainly decided to be insufficient; but the Court distinguish between that case, which was one of master and apprentice, and the case of master and servant. Moreover, in that case there was no averment that the party was absent for an unreasonable time. There is such averment in this case, and the unreasonableness of the absence is admitted by the replication.

Cresswell and *W. H. Watson*, contrà.—By the declaration the agreement between these parties appears to have been for a whole year certain, at a salary &c. The defendant attempts to plead in answer to this, what is either a confession and avoidance or else another agreement, one of the terms of which is, that the plaintiff should not absent himself without reasonable cause &c. If it is not a confession and avoidance, but merely an immaterial issue, the Court will then mould the rule, and a repleader will be awarded; *Plummer* v. *Lee* (*b*). However it seems rather to amount to a confession and imperfect avoidance, because what is introduced in addition amounts to nothing more than what the law would infer. It sets up no further undertaking on the part of the plaintiff than the law would necessarily throw upon him. It contains, therefore, a good confession. That being so, the contract admitted must be governed by the general rule, that one party cannot dissolve a contract on a mere breach by the other, unless that breach goes to the very root and essence of the contract; there was nothing of the kind here. This engagement does not stand on the same footing as one between master and servant. Nothing short of gross immorality of conduct, or a neglect of the special duties of his situation by the plaintiff, would afford a ground for dissolving the contract; *Callo* v. *Brunker* (*c*); *Ridgway* v. *The Hungerford Market Company* (*d*); *Atkin* v. *Acton* (*e*). A contract is not at an end unless something has been done which actually defeats the object for which it was made, *Freeman* v. *Taylor* (*f*). The defendant ought to have put on the record some specified injury caused by the plaintiff's absence. (They were then stopped by the Court.)

Lord DENMAN, C. J.—Enough appears upon this plea to amount to a confession of the contract, although the defendant seeks to add to that contract certain other conditions, which he says the plaintiff entered into and afterwards broke, whereby he authorized the defendant to dismiss him. That being so, is there any thing in the plea which amounts to an avoidance of the contract? The plaintiff does not aver that the defendant was guilty of any immoral act, nor that he was obliged to hire any other person. He does not aver that the department over which the plaintiff was employed to preside

(*a*) 1 B. & C. 460.
(*b*) 2 M. & W. 495.
(*c*) 4 C. & P. 518.
(*d*) 3 Ad. & El. 171; *S. C.* 1 Har. & Wol. 244.
(*e*) 4 C. & P. 208.
(*f*) 8 Bing. 124.

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was not perfectly well filled. It is true he avers that divers business of the school was prevented from going on by reason of the defendant's absence. But he does not state that such was the case with respect to the French and drawing department, or that the business of the school generally was interrupted; and, therefore, although the conduct of the plaintiff may have been such as to subject him to an action on the part of the defendant, still I think that the plea shews nothing which at all authorized the defendant to put an end to the contract by dismissing the plaintiff.

PATTESON, J.—I am entirely of the same opinion. I think that the plea contains a confession and avoidance, at least what is intended to be an avoidance. It avers that the defendant did retain the plaintiff in the manner and form stated in the declaration. It then attempts to engraft other conditions upon the contract there set out; that is an admission of the contract as far as stated in the declaration. And it is clear that the contract contained no terms authorizing the defendant to put an end to the engagement upon the grounds stated. The defendant, therefore, does not rely upon the terms of the contract itself, as entitling him to discharge the plaintiff, but he avers other matters as amounting to an avoidance of it. Now these things are not such as would entitle him, even in the case of a master and servant, much less in such a case as the present, to put an end to the engagement. He does not even allege any special mischief to have resulted from the plaintiff's conduct. The plea amounts to a confession and an attempted avoidance; and as that attempt is ineffectual there must be judgment for the plaintiff.

WILLIAMS and COLERIDGE, Js. concurred.

Rule absolute (*a*).

(*a*) As no damages had been found for the plaintiff a rule was made absolute afterwards for a new trial, upon which there was a verdict for the plaintiff on the general issue, damages 4*l.* 4*s.* Verdict for the defendant on the special plea. A rule nisi was then obtained in Easter term, 1838, to enter judgment for the plaintiff, non obstante veredicto, according to the above decision, and made absolute the same term, with the consent of *D. Pollock*, for the defendant.

EMMERSON *v.* SALTMARSH, BROOM and others.

A rate or assessment cannot be made by the Commissioners of Sewers upon a whole township.

REPLEVIN for distraining the plaintiff's goods in his dwelling-house in the parish of Elvington, in the county of York. Avowry by the defendants as Commissioners of Sewers. At the trial at the York Lent assizes 1835, before *Parke*, B., a verdict was found for the plaintiff, damages 3*l.*, subject to the opinion of the Court upon the following case:—The plaintiff, at the time of the distress being made, was constable of the township of Elvington, in the county of York, and was then, and had been for fourteen years previously, the occupier of about forty-four acres of land in that township. The defendant *Broom* was bailiff of the other defendants, who are Commissioners of Sewers appointed by his majesty's commission, dated the 12th day of July, 1833, for Howdenshire, in the West part of the East Riding of the county of York, within which parts the township of Elvington is locally situated. The case then set out the commission, which, after en-

joining the Commissioners to inquire by the oaths of the honest and lawful men of the said county, place or places where the defaults and annoyances be, proceeded thus: "and who hath or holdeth any lands or tenements, or common of pasture, or profit of fishing; or hath or may have any part, loss, or disadvantage, by any manner of means, in the said places, as well near to the said dangers, lets, and impediments, as inhabiting or dwelling thereabouts, by the said walls, ditches, tanks, gutters, gates, sewers, trenches, and other the said impediments and annoyances; and all those persons and every of them, to tax, assess, charge, distrain, and punish, as well within the metes, limits and bounds of old time accustomed or otherwise, or elsewhere within this our realm, after the quantity of their lands and tenements and rents, by the number of acres and perches, after the rate of every person's portion, tenure, or profit, or after the quantity of their common of pasture, or profit of fishing, or other commodities there, by such ways and means, and in such manner and form, as to you shall seem most convenient."

On the 14th December, 1833, the Commissioners held a Court of Sewers at Howden, in the county of York, and then made a rate or assessment on several townships (of which Elvington was one), and ordered the constables of the several townships respectively to pay the sum of money assessed upon each township on or before the 1st day of March then next.

At a Court of Commissioners of Sewers, held the 26th April, 1834, an order was made upon the constable of Elvington (the plaintiff) to appear at the next Court of Sewers, to shew cause why the sum of 4*l.*, rated or assessed upon the said township as mentioned, had not been paid, pursuant to the order of the said Court. The plaintiff appeared personally, and refused to pay the rate, whereupon, on the 23d August, 1834, the goods and chattels of the plaintiff were distrained, by virtue of a warrant from the defendants. The warrant, after reciting that the township of Elvington had been rated at the sum of 4*l.*, recited that *George Emmerson* (the constable of the said township) being an inhabitant and holder of certain lands and tenements within the said township, and a party subject and liable to pay and contribute towards the said rate and assessment, had refused to pay the said sum of 4*l.*

The earliest commission of sewers for the district in question, which is preserved amongst the proceedings of the Court, was in the eighth year of the reign of Queen *Anne*, and similar commissions (in the whole amounting to fourteen) appear to have been granted from time to time till the commission by which the present defendants were appointed Commissioners. It also appears by the books of the Commissioners, that from 1725 to the present time rates or assessments have been made by the Commissioners acting under the said commissions, upon the same townships and in the same relative proportions as the assessment of 14th December, 1833, but for different amounts. It further appears by the same books, that the following payments of rates have been made by or for the township of Elvington: (that is to say,)

		£	s.	d.
In 1725,	Elvington	1	0	0
1728	do.	1	0	0
1748	do.	1	0	0
1759	do.	1	6	8
1828	do.	2	0	0
1831	do.	4	0	0

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And that the two last mentioned of those payments were made after orders of Court for the payment thereof made, and under threat of a distress upon the constable. It also appears from the books and proceedings of the Commissioners, that an order was made on the 22d August, 1778, requiring the attendance of several inhabitants of Elvington, Barnby, and other places, at the next Court of Sewers, to shew cause why their assessments had not been paid; and that by an order of the Court, dated the 24th day of October, in the same year, a warrant of distress for levying a rate was issued against the inhabitants of Elvington. From 1725 to the commencement of the present action, no instance, with the above exception, has been produced or proved wherein disobedience to any order made upon the constable, for the rate laid by the Commissioners upon the entire township, has been followed by a warrant of distress upon his goods and chattels, but no entry or account of the receipts of the rates, from 1778 until the appointment of the present clerk in 1831, has been kept; and no instance has been produced or given of disobedience by a constable, to any order of the Commissioners, for the payment of a rate, until the occasion of the present distress. The case then set out a private act of parliament, connected with the drainage of the district, and for improving the River Darwent, which, after giving the Commissioners jurisdiction over the river, provided that the said undertakers (of the navigation), their heirs and assigns, are to bear the whole charge of opening, cleansing, and scouring the said river of Darwent.

The River Darwent runs by the side of the township of Elvington. If the banks of the Darwent were suffered to go down, some parts of the township would be overflowed by the river, but not the plaintiff's lands, which are on the high ground, so much above the level of the river that they cannot be injured by any floods from it.

There are two of these dikes or drains (one of which is called the Kexby drain) in that township into which part of the lands in the township drain; those dikes empty themselves into the River Darwent, and are under the survey and jurisdiction of the Commissioners of Sewers; part of the lands occupied by the plaintiff drains into the Kexby drain, and the other part into a drain, not a plain dike, but which also runs into the Darwent. The Kexby drain runs by one side of the plaintiff's house. If those drains were stopped up, the water would flow back on the plaintiff's land. The Commissioners of Sewers have never, within the memory of man, maintained, repaired, or cleansed any of the drains or sewers in the township of Elvington, all such drains and sewers have been and still are cleansed, maintained, and supported, by the occupiers of adjoining lands; but the Commissioners of Sewers have surveyed such drains and sewers from time to time, and have set pains on the occupiers of lands adjoining, in order to compel the cleansing and repairing of the same.

The River Darwent is maintained, cleansed, and supported under the provisions of the said act. The banks are repaired by the occupiers of the adjoining lands, and the Commissioners of Sewers have viewed four or five years ago. The Commissioners under the statute of *Anne*, have never interfered with the banks of the Darwent. These Commissioners do not act at all, only five or six of them survive.

Part of the lands, comprising about 100 acres in the township of Elvington, are occasionally flooded by water from the River Darwent, and the remainder

are much higher and not so subject to be flooded. The lands occupied by the plaintiff are in the high part of the township, and would not be overflowed by water even if the banks of the River Darwent were thrown down. The township of Foggathorpe is a township in the parish of Bubwith, within the jurisdiction of the Court of Sewers. The parish of Bubwith comprises the following townships; viz., Spaldington, Bubwith, Foggathorpe, Havlethorpe, Gripthorpe, Willitoft, and Breighton; Foggathorpe is not introduced into the general rate or assessment laid by the Commissioners on the 14th December, 1833.

If the Court is of opinion that the distress made upon the goods of the plaintiff, under the above circumstances, is illegal, then the verdict for the plaintiff is to stand; otherwise a verdict to be entered for the defendants, it being understood that both parties are at liberty to refer to the pleadings in the cause, and the above-mentioned statute, 12 *Anne*, as part of the case.

Alexander (*a*) for the plaintiff.—The rate in question afforded no justification to the defendant. It is a rate on a township, and a rate upon a township eo nomine is illegal. This appears from the language of the statute, from the language of the commission (*b*), and from many authorities. Opposed to them is the opinion of Mr. *Callis* (*c*), only, and the cases on which he founds that opinion are not analogous. The words of the statute 23 *Hen.* 8, c. 5, s. 3, shew clearly that the rate was intended to be on those only who are affected by the benefits of its application, or who are prejudiced by, or have caused the damage done,—not on the districts, in which there may be other persons not so circumstanced. The commission also provides, that the parties liable shall be taxed after the quantity of their lands &c., by the number of acres and perches " after the rate of each person's portion, &c. (*d*)". In the case of the *Isle of Ely* (*e*), it was resolved that a general tax on a town is not lawful. The cases are collected in the notes to Mr. *Fraser's* edition of the reports, and do not support the position of Lord *Ellesmere* to the contrary. It is possible that a sudden emergency, such as he suggests, may excuse that mode of rating, but cannot make it on other occasions lawful. Indeed it is the duty of the Commissioners to be informed of the situation and circumstances of all the landowners, and to rate them accordingly, and a rate on any person not benefited by the sewers is bad; *Case of Romney Marsh* (*f*), *Helly* v. *Boyer* (*g*), *Custodes, &c.* v. *The Inhabitants of Owtwell* (*h*), *Bow* v. *Smith* (*i*). Recent cases establish the same principle; *Masters* v. *Scroggs* (*k*). He also argued, that even supposing the rate to be good, it could not be all levied on one individual, *Vin. Ab.* tit. *Sewers*; and also that it was bad, inasmuch as the place in question was under a different jurisdiction, and because it appeared from the case that one-fourth of the plaintiff's land was upon an ascent, and that he drained into the Derwent.

(*a*) Trinity term, April 26.
(*b*) Callis, 2.
(*c*) Page 122.
(*d*) Callis, 3.
(*e*) 10 Rep. 141, a.
(*f*) Callis, 122.
(*g*) Cro. Jac. 336; Vin. Abr. *Sewers* (E).
(*h*) Style, 178, 191; Vin. Abr. *Sewers* (B), where nearly all the old cases are collected.
(*i*) 9 Mod. 94; *S. C.* 2 Eq. Ca. Abr. 206.
(*k*) 3 M. & S. 447.

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Cresswell, contrà.—The present course of rating, and the same proportions, have been invariably pursued from 1725 up to this time. Admitting the principle laid down, that those who enjoy benefit from the sewerage are alone liable to be rated, it is clear that the plaintiff is properly rated, because the case states, that if the drains were stopped up, the water would flow on his land. The case of *The Level of Hull* (*a*) decides that an acre-rate is good; that is of the same nature as the present rate. The resolution in 10 *Rep.* may be explained. The object for which the rate was levied, was one by which different persons might be differently benefited, and therefore a rate upon individuals would be proper. *Callis's* doctrine, which he himself very fully discusses and establishes, is adopted by *Comyn* (*b*), without any quære. Lord *Ellesmere's* position is reasonable in itself, and derives much weight from his authority. In *Moore*, 825, the lords of the council find that the Commissioners have authority to impose a tax on a township. *Hetly* v. *Boyer* (*c*) is a very different case; there a fine had been imposed by way of punishment on a township, and it was held that it could not be all levied on one individual. Formerly, when a township was amerced, the tax might be levied on an individual (*d*). Here the party might have brought trespass if he was not subject to the tax. Supposing the plaintiff known to be the occupier of land, he has not shewn, as he ought to have done to the Commissioners, that others were also occupiers; and it does not appear either directly, or by reasonable intendment, that there were any lands other than the plaintiff's. In *Soady* v. *Wilson* (*e*), the Court would not inquire into the quantum of the rate, it appearing that the party did profit by the application of it in some degree.

Alexander, in reply.—It is by no means clear that an acre-tax is good; *Commissioners of Sewers* v. *Newburgh* (*f*); but if so, that would not shew the present to be good; an acre-tax might vary according to locality, which this does not. The onus does not lie on the plaintiff to point out who are land-owners.

Cur. adv. vult.

Lord DENMAN, C. J., in Trinity term last, delivered the judgment of the Court.—The question in this case is, whether a rate or assessment can be made by the Commissioners of Sewers upon a whole township; and it will be proper, in the first instance, to advert to the commission of sewers itself, to see all the powers of the Commissioners.

They are to inquire, by the oaths of honest and lawful men of the county, place, or places, where default or annoyances, or through whose default the hurts and damages have happened, and who hath or holdeth any lands or tenements, or hath or may have any hurt, loss, or disadvantage, by any manner or means in the said places, as well near to the said dangers, lets, and impediments, as inhabiting or dwelling thereabouts, by the said walls, ditches, banks &c., and other the impediments and annoyances; and all those persons, and every of them, to tax, assess, charge, distrain, and punish,

(*a*) 2 Str. 1127.
(*b*) Com. Dig. *Sewers* (E 2).
(*c*) Cro. Jac. 336.
(*d*) Callis, 124, 125.
(*e*) 3 Ad. & El. 248; *S. C.* 1 Har. & Wol. 256.
(*f*) 3 Keble, 827.

as well within the metes, limits, and bounds of old time accustomed as otherwise, or elsewhere within the realm, after the quantity of their lands, tenements, and rents, by the number of acres and perches, after the rate of every person's portion, tenure, or profit, or other commodities there, by such ways and means, and in such manner and form, as to them, or six of them, whereof those of the quorum shall always be three, shall seem most convenient to be ordained and done for redress and reformation to be had in the premises.

Now such being the effect of the commission, in the case of *The Isle of Ely* (*a*), it is stated to be clearly resolved, that the tax generally of a several sum in gross upon a town is not warranted by the commission of sewers, but ought to be particular, according to the express words, upon every owner or possessor of lands, tenements, and rents, &c. That indeed was of a new river, but still the resolution of Lord *Coke*, and the two judges to whom the decree of the Commissioners of Sewers was referred, must be considered as authority.

In *Moore* (*b*), at a meeting of a board of the privy council, a full report, upon the authority of the Commissioners of Sewers, was made by Lord Chief Justice *Popham*, "that they cannot lay a tax or rate upon any hundreds, towns, or the inhabitants thereof in general, but upon the first presentment and judgment to charge every man in particular according to the quantity of his land or common."

The same rule was laid down in *Hetley* v. *Boyer* (*c*). So also in the case of *The Inhabitants of Owtwell* (*d*). Several other cases will be found collected in *Viner's Abr.* tit. *Sewers*, and *Comyn's Dig.* tit. *Sewers;* and reference is made to several cases in *Fraser's* edition of *Coke's* Reports, in the case of *The Isle of Ely* (*e*).

Callis, however, in page 121, and the following pages, says, "that a rate or assessment may be made on a town generally, and that the persons who are liable may afterwards apportion it among themselves." Though he also says (in another place), that the Commissioners may, in the first instance, assess the particular individuals, and he cites a number of instances to prove his proposition. The cases he cites appear to be amercements on towns or other districts, but which are not circumstanced as assessments made by Commissioners of Sewers, where their duty is prescribed by the commission itself. *Comyn*, indeed, in his Digest (*f*), says, that an assessment may be charged in general upon each town, who may afterwards apportion it among themselves; but the only authority he cites for that is *Callis*. And *Comyn* afterwards says, that an assessment upon a town in general, it it be not afterwards apportioned, is not good; and it does not appear that there is any other direct authority for the validity of the assessment upon an entire township, but what is derived from *Callis;* and we think that the other several authorities outweigh his.

The case of *The Level of Hull* (*g*) was cited in support of the assessment, but that appears to be an assessment of ninepence an acre on 1312 acres, and

(*a*) 10 Rep. 143.
(*b*) Page 824.
(*c*) Cro. Jac. 336.
(*d*) Style, 185.
(*e*) 10 Rep. 141, a.
(*f*) Title *Sewers*, 2d ed.
(*g*) 2 Str. 1127.

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we therefore may suppose that the Commissioner had considered what lands were liable; and the question there appears to have been, whether it should have been upon the occupiers; but suppose it did support *Callis*, it would not, in my opinion, be a sufficient answer to the other authorities.

It has been said that this is the course which has been pursued ever since the year 1725. That may be, and perhaps it may, upon the whole, have been found more convenient to let the landowners settle the proportions among themselves, so as not to trouble the Commissioners to fix the proportions, unless there should be a necessity. This course of practice, however, cannot vary the law of the case; and upon the whole we are of opinion that the general assessment cannot be supported, and that there must be

Judgment for the plaintiff.

The following addition to the judgment is made by the desire of the Court.

The Court inadvertently cited the case from *Moore* in support of their judgment; but though the words in *Moore* are the same as in the present judgment, yet in the case in *Moore* the Court express their disapprobation of those propositions.

But though the case was thus cited inadvertently as an authority in favour of the plaintiff, it makes no difference in the judgment of this Court on the whole case, as they do not concur in the disapprobation in the report in *Moore*.

The QUEEN *v.* BLISS.

Indictment for obstructing a highway. Plea, not guilty. At the trial it was proved that a road did exist in the locus in quo, but it was not proved to be a public road. Forty years before, a deceased occupier of the land over which the road passed, planted a tree near the road, and at the time of planting it, stated that he did so "to mark the road, to shew where the boundary of it was when he was a boy:"—*Held*, that this statement was not admissible in evidence as a declaration accompanying an act, or as having been made against the interest of the speaker, who was not tenant in fee, or as evidence of reputation.

INDICTMENT for obstructing a highway in the parish of Brandon, in the county of Suffolk. The question at the trial before *Gaselee*, J., at the Lent Suffolk assizes, 1836, was, whether the road in question was a public or a private road. On behalf of the prosecution, a witness was called, who proved that, about forty years before, he saw one *Rampling*, since dead, but who then was tenant of certain meadows over which the road passed, planting a willow. He was then asked what *Rampling* said when he planted the willow. The question was objected to, but the objection was overruled by the learned judge, and the witness stated that *Rampling* said he planted the willow to shew where the boundary of the road was when he was a boy. Verdict for the crown.

Storks, Serj. in Easter term, 1836, having obtained a rule nisi for a new trial, on the ground that the evidence was inadmissible,

Biggs Andrews and *Byles* now shewed cause. The statement made by *Rampling* was admissible on three grounds. It was evidence of reputation; it accompanied an act done; and it was against the interest of the party making it.

This was good hearsay evidence of the *extent*, which involves necessarily evidence of the *existence* of the road. If a statement directly affirming the

existence of the road would have been evidence, there can be no reason why a statement should not be admitted which affirms the extent of the road.—[*Coleridge*, J.—Ought you not first distinctly to shew upon the face of the evidence that there was a public road in existence? The answer which was given leaves it ambiguous whether the road was public or private.]—At all events it was proper to allow the evidence to go to the jury.—[*Coleridge*, J. Can it depend on the meaning the jury attach to a statement whether it is admissible in evidence or not?]—The word "road" taken alone means public road.

Then the fact of the planting the willow being clearly receivable, any declaration accompanying and explaining that act is also admissible.

Rampling also, at the time of planting the willow, being tenant of the land where he planted it, any declaration of his which limited its extent was receivable, as being against his interest. The interest of the tenant is in many respects the same as that of the reversioner. And where those interests concur the declaration of the tenant is equally receivable with that of the landlord, and upon the same grounds. This doctrine is expressly laid down by *Le Blanc*, J., in *Daniel* v. *North* (*a*), and applied to cases where the question is a right of way or a right of common.

Lord DENMAN, C. J.—The answer to this question, put to a witness called on behalf of the prosecution, was one calculated to make a great impression on the mind of the jury. It was, that in his youth he had heard *Rampling*, now deceased, declare that his motive for planting a willow tree was to mark the boundary of the road. There was nothing in his declaration which went to determine whether this was a public or a private road, nothing which referred to any existing reputation on the subject whatever. And I am of opinion that it was not receivable on any one of the three grounds that have been relied on in its favour. First, I cannot conceive how it can be received as a declaration accompanying an act done. If we were to hold any loose declaration as receivable, simply because it was accompanied by some act, we should enable people at their pleasure to dispose of the property and rights of others. No doubt that the fact of the willow being there was receivable; the fact that the public kept within the line of the willow was receivable, but it is impossible to admit any declaration which a private individual might make as to his motives in planting it.

Another ground on which the admissibility of the declaration was put, was, that it was made by a deceased person against his interest. But this person was only a tenant of the property, and if we were to hold any declaration of his admissible on this ground we should at once overrule the case of *Daniel* v. *North*, because it is very easy to suggest cases where the interest of a tenant as to the existence of road might be directly opposed to that of his landlord. The principle of that case wholly applies on the present occasion; it was there determined that no degree of acquiescence on the part of a tenant could conclude any thing as against the rights of his landlord. And there is nothing in the circumstances of a direct declaration which place that upon a different footing from the evidence to be derived from acquiescence. It was also contended that this declaration was receivable as evidence of reputation;

(*a*) 11 East, 372.

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parish of St. Martin was made upon another examination of the pauper, dated 27th June, 1835, touching the same hiring and service with *Furber*, and also upon an examination of the said *Furber* touching the same hiring and service, and copies thereof were sent to the churchwardens and overseers of St. Martin. On the 17th August the appellant parish sent to the churchwardens and overseers of the parish of Church Knowle a notice of appeal, signed by four churchwardens and four overseers, therein described as the churchwardens and overseers of the poor of the parish of St. Martin, in the city of New Sarum, and on the 5th October a statement of the grounds of appeal, signed by two churchwardens and two overseers only, therein described as the churchwardens and overseers of the poor of the parish of St. Martin in the city of Salisbury, and the appeal was entered at the Michaelmas sessions. The grounds of appeal against the second order were the same in the second statement, as those in the first statement, with the addition of a distinct ground of appeal as follows:—"And because a former order of the same justices, for removing the said pauper from Church Knowle to St. Martin aforesaid, had been quashed by the court of quarter sessions of the said county of Dorset, at the April sessions in the present year; and which said order of the said court related directly to the point then and now in question between the parties to the present appeal, and is therefore binding and conclusive between them, so far as respects the place of the last legal settlement of the said *Robert Galley*."

At the hearing of the appeal the Court overruled an objection, made by the counsel for the respondents, that the appellants were bound by the description contained in the notice of appeal of the four churchwardens and four overseers who signed the same, and that they were thereby precluded from putting in the statement of the grounds of appeal signed by two churchwardens and two overseers only. The same Court overruled an objection made by the counsel for the appellants to the reception of parol evidence, to explain the grounds on which the respondents had moved to have the first order quashed; and, after hearing the same, thought the quashing of the said order conclusive as between the same parties, and accordingly quashed the last order.

If the Court of Queen's Bench should think that the statement of the grounds of appeal against the last order was improperly admitted, then the order of sessions to be quashed, and the last order of removal confirmed; or if the Court should think that the justices were not warranted in treating the first order quashed, under the circumstances, as conclusive, then the order of sessions to be quashed.

Barstow and *Lucena* in support of the order of sessions. The sessions properly overruled the objection that the statement of the grounds of appeal was not signed by a sufficient number of parish officers. The notice of appeal was signed by four churchwardens and four overseers, and the statement by two churchwardens and two overseers only. But there is nothing in the New Poor Law Act (4 & 5 *Will.* 4, c. 76, s. 81,) to require the signature of a majority or even of half the number of the parochial officers; therefore the signature of half is sufficient. Where a statute requires notice, verbal notice is legal; *Rex* v. *The Justices of Surrey* (*a*); and this was the case under the

(*a*) 5 B. & A. 539.

poor law. Now if a verbal statement had been allowable in this case, as it would if it had not been otherwise provided by the new act; of course it would be enough that such verbal statement should be communicated to the respondents by a single one of the officers of the appellant parish. And the new act, though it requires a statement in writing, does not require it to be signed by any particular number of overseers. In point of fact, however, the statement in this case was signed by all the parish overseers; for by two local acts (*a*) the two parishes of Salisbury are united only for the maintenance of the poor, but are to be distinct for the purposes of settlement; and the appellant parish alone has no more than two churchwardens and two overseers. All local acts are recognised by the new statute.

The judgment of sessions, quashing the former order of removal, is conclusive against the respondent parish. The quashing an order is not like a nonsuit, but a verdict. In *Rex* v. *Wick St. Lawrence* (*b*), it is true, where an order of removal had been quashed, and a subsequent order of removal to the same parish was made, it was held competent to the removing parish to shew, on appeal, that the first order was quashed because the pauper was at that time irremovable, but that he was so no longer. In that case, however, the state of facts had been changed since the quashing of the first order, at which time the pauper was irremovable; but if the facts had continued the same, the first adjudication upon them by the sessions would have been conclusive. In this case it is not pretended that the second order was made under a new state of facts. In that case too when the respondents consented to the quashing of their order, their reason for doing so was communicated to the appellants. If the respondents in the present case had communicated their reason for quashing, the appellants might have waived the objection and insisted on going into the merits; and the former appeal must be taken to have been decided on the merits, and also to be conclusive, as it does not appear that any new settlement has been gained; *Rex* v. *Bradenham* (*c*). The alleged reason for quashing the former order is insufficient; it is not necessary to state in the examination the fact of residence for forty days, it is enough to state the settlement. Even if the omission to aver the pauper's residence had been made a ground of appeal, it would not have been a valid ground, as may be inferred from *Rex* v. *Kelvedon* (*d*) and *Rex* v. *Misterton* (*e*); and it does not appear that the statement of the grounds of appeal made the residence at all material.

Bond and *Stock*, contrà. The appellants ought not to have been heard, for their notice of appeal admits that they have eight parish officers, and their statement was signed by four only. No decision has gone beyond *Rex* v. *Derbyshire* (*f*), in which it was held that signature by a majority will satisfy the 81st section of the new statute, and the local acts cannot be relied on, for they are not set out in the case.

The quashing of an order of removal is conclusive as to nothing but the

(*a*) These acts were not part of the case, though referred to in argument.
(*b*) 5 B. & Ad. 526.
(*c*) Burr. S. C. 394.
(*d*) 1 N. & P. 138; *S. C.* 2 Har. & Wol. 415.
(*e*) 2 N. & P. 109; *ante*, 435.
(*f*) *Ante*, 248.

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point decided; and where an order is quashed for matter of form, the judgment is not conclusive upon the parties; *Rex* v. *St. Andrew, Holborn* (*a*), *Rex* v. *Penge* (*b*). The first order in this case, omitting to state the residence of the pauper, was quashed for want of form; it cannot be contended that the merits were inquired into. What an informality in such orders consists of, is explained by Lord *Denman*, C. J. in *Rex* v. *Cottingham* (*c*). Where an order has been quashed by the sessions for informality, it is not necessary that they should make a special entry of the grounds of their judgment. No such entry was made in *Osgathorpe* v. *Diseworth* (*d*); in *Rex* v. *Wheelock* (*e*), and in *Rex* v. *Wick St. Lawrence* (*f*), it was expressly held to be quite unnecessary. And it never has been held necessary to communicate either to the sessions or the appellants the ground on which the order is abandoned. In none of the cases cited, except the last, was the second order of removal made under an altered state of facts. The appellants may have their costs as often they are successful, and are therefore not aggrieved by having to attend the sessions a second time upon the same matter. The observations of Lord *Denman*, C. J. in *Rex* v. *Wick St. Lawrence*, on the subject of admitting parol testimony to explain the judgment of sessions, bear strongly on this point:—"It is said, that admitting parol evidence to explain such an order of sessions will be inconvenient; but supposing the inconvenience were greater than any I can see in the case, injustice is the greatest of inconveniences, and when an order of removal has been discharged, not on the merits, but on other grounds, it would be great injustice if it could be set up as a decision upon the merits, by a party, who knew that they had not been inquired into."

Lord DENMAN, C. J.—I think the sessions have come to a right conclusion upon both points. The first question is, whether they were justified in overruling an objection made to the statement of the grounds of appeal, as not having been signed by a sufficient number of parish officers. On this point it is to be observed, that nothing is stated in the case to shew that the persons who signed were not an actual majority, and we must now assume that they were so, in fact, as the objection was taken; and it is to be presumed that the sessions were satisfied on this point.

The other point submitted to the Court is, whether the judgment of the sessions, quashing the order of removal on the first appeal, is conclusive against the respondents, that order having been, it is said, quashed for a mere informality. Now in all the other cases in which an order of removal has been quashed for some formal defect, the judgment itself of the sessions has expressly proceeded on such defect, or the respondents have communicated either to the Sessions, or at least to the opposite party, as in *Rex* v. *Wick St. Lawrence*, the reasons for which they have consented to the quashing of their own order. But here the respondents quashed their order from motives of their own, which they did not communicate either to the Court or to the appellants. In what way then are we to know that their order was quashed for want of form? If we were to hold that the former trial was not conclusive, we should encourage parties, whenever it might be inconvenient to them

(*a*) 6 T. R. 613.
(*b*) Nol. Rep. 176.
(*c*) 2 Ad. & El. 250.
(*d*) 2 Str. 1256.
(*e*) 5 B. & C. 511.
(*f*) 5 B. & Ad. 526.

to try, to make some intentional informality in their proceedings, for the purpose of enabling themselves to come to the sessions a second time. The appellants having no explanation would be misled, and twenty years afterwards the sessions would have to inquire, not what was done on the previous trial, but with what intention and with what motive. But was the order, in this case, quashed for informality? The examination of the pauper stated his settlement by hiring and service only in the appellant parish, but that involved his residence there under the contract, because otherwise no settlement could have been gained by him. I think that, where a respondent parish quashes its own order of removal, that proceeding must be considered conclusive against them, unless they explain with precision the grounds and motives of it, either to the sessions or the appellant parish, so as to make it apparent, on any subsequent appeal, that the merits have never been gone into.

PATTESON, J. and WILLIAMS, J. concurred.

COLERIDGE, J.—I am of the same opinion, but at first I entertained very great doubts on the question. Although a judgment of sessions, quashing an order of removal, is generally final, yet parol evidence is admissible to shew that such judgment was given on some special ground, independently of the merits, and to enable the unsuccessful party to come again to trial. But I think this order must be taken to have been quashed on the merits. The order of removal was not defective, but the respondents applied to quash it, because they were unprepared with sufficient evidence in support of it.

Order of Sessions confirmed.

The QUEEN *v.* WATTS.

1. An appeal lies to the Quarter Sessions against the accounts of an assistant overseer.
2. The next Quarter Sessions to which an appeal lies against the accounts of an overseer, are the sessions next after such accounts have been delivered over to the succeeding overseers.

UPON an appeal against the account of *George Watts*, assistant overseer of the poor of the parish of Slembridge, in the county of Gloucester, entitled "An account of disbursements of *George Watts*, assistant overseer, from 6th April 1834 to 6th April 1835," and containing amongst other things the following items:

Paid six months pay for maintenance of the poor as per contract, 29*l.* . . .	17*4l.*
Paid six months pay for maintenance of the poor as per contract, 39*l.* . . .	23*4l.*

the Court ordered the said items to be struck out of the account, subject to the opinion of Her Majesty's Court of Queen's Bench on the following case:—

It appeared that the said *George Watts* was assistant overseer of the poor of the said parish of Slembridge from the 6th April 1834 to the 6th April 1835, and executed all the duties of an overseer of the poor. On the 2d April in the year 1835, at a vestry meeting duly held, the said account of the said *George Watts* was examined and allowed by *James Cornock* and *John French* churchwardens, *George Greening* overseer, and by *William Ludlow*, *James Smith* and *John Bailey*; and on the next day, being Friday the 3rd of the same month, the said account was submitted to two justices of the peace

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for the said county, at a special sessions holden at Wootton-under-Edge for that purpose; and was by such justices signed and allowed. The said *George Watts* did not however deliver over his said account until the 8th of May following, when he delivered it in vestry to the churchwardens, and the person who had been appointed assistant overseer to succeed him. An affidavit of the appellant (who was a rated inhabitant of the said parish) sworn in Court, was put in, and, after objection by the counsel for the respondents to its admissibility, was received by the Court. By this affidavit it appeared that the appellant had no actual knowledge of the said account until the 23d of April in the year 1835. The Easter sessions for the said county, if they had been holden according to the ordinary course, would have commenced upon Tuesday the 7th April; but in consequence of the assizes they were held on Tuesday the 14th April, by an order made pursuant to the act of the 4th & 5th *Will.* 4, c. 47. By the rules of the quarter sessions for the said county, notice of trial of an appeal must be given on or before the Tuesday in the week preceding the sessions; and consequently the last day for giving such notice for the said Easter sessions, so held as aforesaid, was Tuesday the 7th April aforesaid. No notice of appeal against the said account was given for, nor was any appeal entered at the said Easter sessions, but notice was duly given for the Trinity sessions holden in the month of June following. The questions for the opinion of the Court are, 1st. Whether upon the evidence the appeal was brought in due time? 2dly. Whether an appeal lies against the account of an assistant overseer?

W. J. Alexander and *Greaves* (Nov. 8th) in support of the order of sessions. The first question to be considered is, whether an appeal lies against the accounts of an assistant overseer. The 17 *Geo.* 2, c. 38, s. 4, allows the appeal against an overseer's account, and the office of an assistant overseer was created by a subsequent statute, the 59 *Geo.* 3, c. 12, s. 7. This statute empowers the assistant overseer "to execute all such of the duties of the office of overseer of the poor, as shall in the warrant for his appointment be expressed, in like manner and as fully to all intents and purposes as the same may be executed by any ordinary overseer of the poor." It may be said that it is necessary for the Court to know the contents of the defendant's warrant; but as the sessions have found that he performed all the duties of an overseer, it must be taken that they have inspected the warrant; this Court therefore will not entertain any difficulty as to the nature of his office. In *Bennett* v. *Edwards*, which was discussed a second time before the Court, after a new trial (*a*), an assistant overseer having, by virtue of his office, the poor rate in his custody, was held liable to a penalty, imposed by the 17 *Geo.* 2, c. 3, for not producing it when lawfully demanded. That case is much stronger than the present, as it sanctioned the extension of penalties imposed upon an overseer, to the office of assistant overseer, although not in existence at the time when the act, imposing such penalties, was passed. *Batcheldor* v. *Hodges* (*b*) and *Rex* v. *Great Faringdon* (*c*) are also authorities to the same effect. It cannot be doubted that the defendant, by whatever name he may be called, has acted as an overseer, which is enough to show that he filled such an office; *Rex* v. *Gordon* (*d*).

(*a*) 8 B. & C. 702, confirmed on error, 6 Bing. 230.
(*b*) 4 Ad. & El. 592; *S. C.* 1 Har. & Wol. 725.
(*c*) 9 B. & C. 541.
(*d*) Leach C. C. 337 n.

The other question is, whether this appeal was in time. The 17 *Geo.* 2, c. 38, s. 1, requires "that the churchwardens and overseers of the poor shall yearly and every year, within fourteen days after other overseers shall be nominated and appointed to succeed them, deliver in to such succeeding overseers a just, true and perfect account in writing, &c." The 4th section of the same statute gives the appeal to the next quarter sessions; and the 50 *Geo.* 3, c. 49, s. 1, after reciting this statute, directs that every such account shall be submitted by the churchwardens to two or more justices of the peace of the county at a special sessions for that purpose to be holden within the fourteen days above mentioned. If therefore the next sessions to which the appeal is given are the next sessions after the accounts are delivered over to the succeeding overseers, which is the publication of them, this appeal was in time, for the delivery did not take place until the 8th May. *Rex* v. *Thackwell* (*a*) is quite to this point; there the accounts were not delivered until the day on which the Easter sessions were held, and it was held that the appeal need not have been lodged before the Midsummer sessions. So in *Rex* v. *The Justices of Dorsetshire* (*b*), where the accounts were not allowed till the last day when an effectual notice of appeal to the then next sessions could have been given, and it did not appear when the appellant had notice of the allowance, an appeal to the subsequent sessions was held to be in time. Now an effectual notice, that is, by the practice of the *Gloster* sessions, a week's notice could not possibly have been given in this case, if the next sessions are to be considered the next after the allowance of the accounts; for the postponed sessions are by 4 & 5 *Will.* 4, c. 47, to be treated as the regular sessions, which would have taken place on the 7th April, and the allowance was not made until the 3d. *Rex* v. *Southampton* (*c*) and *Rex* v. *Monmouthshire* (*d*) shew that even in cases of appeals against orders of removal, the next practicable sessions are always intended, although the appellant has notice by the order itself as soon as he is aggrieved, whereas in the case of overseers' accounts, their allowance, if it is to the sessions next after the allowance that the appeal must be made, takes place before magistrates and without the appellant's privity. The affidavit in this case shews that the appellant had no knowledge of the accounts until the 23d April, so that *Rex* v. *Pembrokeshire* (*e*), where the appellant had ample notice, does not apply.

J. Talbot, contrà.—No appeal lies in this case. An appeal is strictissimi juris, and is not allowed, unless expressly given; *Rex* v. *The Justices of Surrey* (*f*) and *Rex* v. *Hanson* (*g*). This Court therefore will not extend the appeal to a case which could not have been contemplated by the legislature. If the accounts of an assistant overseer be improper, an appeal can be had against them as the accounts of the overseer, for *Cannell* v. *Curtis* (*h*) shews that the accounts of an assistant overseer are those of the overseers. *Tindall*, C. J. observes in that case, (the accounts of the assistant overseer having been headed "overseers' accounts,")—"I am not clear that such was not the correct heading: for where a deputy acts, the accounts he furnishes are, properly speaking, the accounts of his principal." Where is the responsi-

(*a*) 4 B. & C. 62.
(*b*) 15 East, 200.
(*c*) 6 M. & S. 394.
(*d*) 3 Dowl. P. C. 306.
(*e*) 2 East, 213.
(*f*) 2 T. R. 504.
(*g*) 4 B. & A. 519.
(*h*) 2 Bing. N. C. 228.

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bility of the assistant overseer to cease? He may, on the same principle on which an appeal lies, be committed also under 17 *Geo.* 2, c. 38, s. 2, or under 50 *Geo.* 3, c. 49, s. 1, for not rendering an account. As to *Bennett* v. *Edwards* (*a*), which is commented on in *Whitchurch* v. *Chapman* (*b*), it was decided on a different statute, the 17 *Geo.* 2, c. 3, which comprehends not only churchwardens and overseers, but also "other persons authorised to take care of the poor." *Rex* v. *Farringdon* (*c*) does not apply.

Secondly, this appeal was too late. It ought to have been brought at the next sessions after the allowance by the justices; *Rex* v. *The Justices of Worcestershire* (*d*), in which case Lord *Ellenborough*, C. J. said, "I know not to what difficulties persons, whose property is liable, and those who are bound to account, might be reduced if we were to adopt a different construction. With respect to the objection, that the time may be too short to prepare for the appeal, if, upon any occasion this should be made to appear, the appeal may be lodged and adjourned on a proper application." This case is not very reconcileable with *Rex* v. *Thackwell*. A party may appeal even before the allowance by justices at special sessions, *Rex* v. *Colchester* (*e*). In *Rex* v. *Herefordshire* (*f*), it was held that an appeal must be entered at the next sessions, even if they could not try it; the decisions, however, on this point, it must be admitted, have not been uniform in this respect; *Rex* v. *The Justices of Essex* (*g*) and *Rex* v. *The Justices of Kent* (*h*).

Cur. adv. vult.

Lord DENMAN, C. J. now delivered the judgment of the Court.—Our opinion is asked by the Sessions on three points:—1. Whether an appeal lies against the account of an assistant overseer; 2. Whether the notice of appeal was given in due time; 3. Whether the appellant's affidavit was properly received by the sessions, to prove at what time he became acquainted with the allowance of the accounts by two justices of the peace.

On the first point we see no reason to doubt that an assistant overseer's account may be the subject of an appeal. He is not the servant of the churchwardens and overseers of the parish, but of the vestry, from whom he directly receives his authority; an authority which may indeed be limited by the warrant of appointment, but which does not appear to have been limited in the present case.

The second point may admit of some difference of opinion, but seems capable of being decided on principles of reason and convenience. Some cases have held that the time of allowance by the justices is that from which the time for giving notice must be calculated; *Rex* v. *Coode* (*i*), *Rex* v. *Worcester* (*k*). The language of some others may be thought to import that every parishioner's right to appeal is kept alive as long as he is personally ignorant of the fact of such allowance. A strict adherence to either of these rules might obviously produce injustice; nor do we think that the cases, when fairly considered with reference to their circumstances, lay down either

(*a*) 8 B. & C. 702.
(*b*) 3 B. & Ad. 691.
(*c*) 9 B. & C. 541.
(*d*) 5 M. & S. 457.
(*e*) 5 B. & A. 535.
(*f*) 3 T. R. 504.
(*g*) 1 B. & A. 210.
(*h*) 8 B. & C. 639.
(*i*) Cald. 464; 1 Bott, 281.
(*k*) 5 M. & S. 457.

the one or the other. On the contrary, the Court must on these occasions have had the words of the stat. 17 *Geo.* 2, in their contemplation, which give the right of appeal to the party grieved, "giving reasonable notice" to the next general or quarter sessions of the peace. The Sessions have therefore to adjudge what notice is reasonable; which must depend on their usual practice. Still the word *next*, applied to the sessions, requires an interpretation; next to what period? Not to the period of examination by the vestry before allowance, because the justices upon their investigation, and before allowance, may have struck out every item to which parishioners feel an objection;—not to the allowance itself, because it may be unknown to all the parties interested;—nor to the fact of knowledge by any one disposed to appeal, because that would lead to an inconvenient inquiry into the particular knowledge of individuals, and might keep the officer's account subject to an appeal indefinitely. The only other period to which recourse can be had for this purpose is that, when the parish had the opportunity of knowing the contents of the account. Thus, in *Rex* v. *Thackwell*(*a*), the time for giving notice was held to be properly reckoned from the time when the account was allowed *and published*. We think it may be correctly described as published at the time when it is deposited (according to the 1st sect. of 17 *Geo.* 2,) with the churchwardens and overseers for public inspection, and the fact of depositing bonâ fide made known. In the present instance the sessions have found that this was done on the 8th of May. Therefore the June sessions, when the appeal was lodged, were the next sessions; and the notice was in due time. This makes it immaterial to inquire whether the appellant's affidavit of the time when he knew of the account, was properly admitted. The Court was consequently justified in entering on the merits of the appeal; and having disallowed certain items, the rule for setting aside their judgment must be discharged.

Order of Sessions confirmed.

(*a*) 4 B. & C. 67.

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Where a servant, who had been engaged at a salary for a certain term, was wrongfully dismissed, and after tender of his services for the residue of the term, and the non-acceptance of them by his master, immediately brought indebitatus assumpsit to recover the salary for such residue:—*Held*, that, even if indebitatus assumpsit would lie, the action could not be commenced until the end of the term.

ASSUMPSIT. The first count of the declaration stated, that in consideration that the plaintiff had promised to serve the defendant, as a compounder of medicines, the defendant undertook to continue the plaintiff in his employ for one whole year, and so on from year to year, so long as the parties should respectively please, at a salary of fifty guineas a-year, payable quarterly. It then alleged, that the defendant, before the end of the first year, without sufficient cause, dismissed the plaintiff from his service. The second count was indebitatus assumpsit for work and labour. The defendant pleaded, first, non assumpsit; and secondly, that he did not dismiss plaintiff from his service in manner and form, &c. The defendant also paid 4*l.* into Court on the second count.

At the trial before *Gaselee*, J., at the Bucks Lent assizes, 1836, the plaintiff proved a letter from defendant, who is a druggist, to him, dated June 1, 1835, whereby the defendant engaged the plaintiff as a compounder of drugs.

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No time was mentioned during which the service was to be continued, nor was any salary mentioned. The plaintiff went into the service on the same day. On the 31st of August, 1836, the defendant paid the plaintiff 13*l.* 2*s.* 6*d.* for a quarter's salary, being at the rate of 50 guineas per annum. The plaintiff continued in the service till the 19th of September in the same year, when in consequence of some disagreement, the particulars of which did not appear in evidence, the defendant dismissed the plaintiff from his service; this was on a Saturday. On the following Monday, September 21, the plaintiff, accompanied by his attorney, went to the defendant's shop, and made a tender of his services, which the defendant declined. The present action was commenced on the following day, Tuesday, 22nd September.

The learned judge left it to the jury to say whether the defendant engaged the plaintiff as a yearly servant, whether the defendant dismissed the plaintiff from his service, and whether the sum of 4*l.* was a sufficient remuneration to the plaintiff for the nineteen days of the month of September, during which he had actually served the defendant beyond the first quarter.

The jury found, first, that the engagement of the plaintiff was liable to be determined at the end of any three months. Secondly, that the defendant dismissed the plaintiff on the 19th September. Thirdly, that 4*l.* was sufficient to remunerate the plaintiff for the period of actual service beyond the first quarter.

On this the learned judge directed the verdict to be entered for the defendant, as the special contract for a whole year, as alleged in the declaration, had been negatived. He reserved leave, however, for the plaintiff, on the authority of *Gandell* v. *Pontigny* (*a*) and *Collins* v. *Price* (*b*), to move to enter a verdict for him in the second count for 9*l.* 2*s.* 6*d.*, being the balance of the second quarter, if the plaintiff should be held entitled to recover such balance, upon the general indebitatus count for work and labour.

A rule nisi having been obtained in Easter term, 1836,

Kelly now shewed cause.—The special count being out of the question, by reason of the variance between it and the contract proved at the trial, the only point to be considered is, whether the plaintiff, having been discharged in the middle of a quarter, can, before the expiration of it, bring indebitatus assumpsit for the whole quarter's salary, as if he had actually served for the whole of that period. *Gandell* v. *Pontigny* (*a*), which was indebitatus assumpsit for work and labour, has been relied upon for the plaintiff. In that case Lord *Ellenborough* said, "If the plaintiff was discharged without a sufficient cause, I think this action is maintainable. Having served a part of the quarter and being willing to serve the residue, in contemplation of law he may be considered to have served the whole." If this doctrine be correct, still it does not go far enough for the plaintiff. There the action was not brought until the quarter had expired; it does not follow, therefore, that the action may be brought *during* the quarter. The case, however, does not seem reconcileable with *Archard* v. *Horner* (*c*), in which Lord *Tenterden* ruled, that, on the common count for wages, the plaintiff could not recover for any further period than that for which he had served. This last case is supported by the opinion of the Court, although it does not amount to a de-

(*a*) 4 Campb. 375.
(*b*) 5 Bing. 132.
(*c*) 3 C. & P. 349.

cision, in *Ridgway* v. *Hungerford Market Company* (*a*). If the plaintiff be allowed to recover for work and labour, he might afterwards recover for the dismissal, and thus have two actions for the same matter. And there is this further difficulty, if the action is to lie prospectively, as if for work and labour actually done, that the action will be well brought, although the plaintiff might have been taken back the day after his dismissal, and after the action brought, or although he refused to come back on his master's request, or should die in the middle of the quarter, or go into another service.

Gunning, contrà.—*Gandell* v. *Pontigny* has never been overruled, and was cited and relied upon by the Court in *Collins* v. *Price* (*b*); and it is to be observed that neither of these cases was brought under the notice of Lord *Tenterden* in *Archard* v. *Horner*. But *Archard* v. *Horner* is distinguishable from the present case, because there the plaintiff did not, after dismissal, make a tender of his services, and this circumstance, according to the language of Lord *Ellenborough*, which has been read to the Court, appears to be most material. The objection made to bringing indebitatus assumpsit would apply just as well to bringing a special action for wrongful dismissal before the end of the quarter; it might be objected to the special action also, that the plaintiff might be taken back the day after his dismissal, yet such an action may undoubtedly be brought immediately on the dismissal; *Pagani* v. *Gondolphi* (*c*).

Lord DENMAN, C. J.—This rule was granted in order that the decision of Lord *Ellenborough*, C. J. in *Gandell* v. *Pontigny* might be reviewed. In that case a clerk, who had been dismissed in the middle of a quarter, was allowed to recover in indebitatus assumpsit his whole quarter's salary, on the ground that, as he was willing to serve the residue, he might in contemplation of law be considered to have actually served the whole quarter. Lord *Tenterden*, however, seems to have taken a different view of the law, and, although *Gandell* v. *Pontigny* was not brought under his consideration, still if I were compelled to elect I should prefer the ruling in the more recent case of *Archard* v. *Horner*. But the same question does not seem to arise in the present case, for the plaintiff has at all events commenced his action too soon. He might have been restored to the service before the end of the quarter.

PATTESON, J.—If I were obliged to choose between *Gandell* v. *Pontigny* and *Archard* v. *Horner*, I agree with my lord in preferring the latter case. I do not think any cases except those two are at all inconsistent. *Collins* v. *Price* does not apply: the action was on a special agreement, and was not brought until after the end of the quarter, for which the plaintiff recovered. The same question does not now arise. The action was commenced on the 22nd September, before the quarter expired, and money has been paid into Court to cover the plaintiff's actual services.

WILLIAMS, J.—This is an action for work done during a certain period, and is brought by anticipation before that period is in existence. I also,

(*a*) 3 Ad. & El. 171; *S. C.* 1 Har. & Wol. 244.
(*b*) 5 Bing. 132.
(*c*) 2 C. & P. 370.

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both on principle and authority, should prefer the ruling in *Archard* v. *Horner*, if, under the present circumstances, it could be brought in question.

COLERIDGE, J.—Assuming *Gandell* v. *Pontigny* to be good law, it shews that a willingness to perform work amounts in contemplation of law to actual performance. But if that be so, the analogy only shews that the action cannot be commenced until the period, within which actual performance could take place, has entirely expired. Therefore, without touching the authority of *Gandell* v. *Pontigny*, this rule may be discharged.

Rule discharged.

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1. Where all matters in difference, as well as the cause, are referred by order of Nisi Prius, a motion to set aside the award need not be made within the next four days in term after its publication, although there were not actually any matters in difference out of the cause.

2. To a declaration with four counts in indebitatus assumpsit, the defendant pleaded generally, 1. Non assumpsit; 2. Set-off. The cause and all matters in difference having been referred, the costs of the cause to abide the event of the award, the arbitrator awarded that on both the issues, so far as the same applied to three of the counts, the verdict should be entered for the plaintiff, and as to the remaining count for the defendant, and he assessed the plaintiff's damages on the issues found for him at 19*l.* 5*s.* 1*d.* —*Held*, that as the set-off was pleaded generally to the aggregate demands of the plaintiff, it was not a divisible plea, and that the arbitrator was wrong, therefore, in finding for the defendant on a single count, because the set-off equalled the plaintiff's demand on that particular count: but that, as the mistake was in favour of the defendant, he could not avail himself of it on a rule to set aside the award, nor could the Court amend the award so as to deprive the defendant of costs on the issue so found in his favour; and the plaintiff agreeing to pay such costs, the rule was discharged.

ASSUMPSIT for goods sold and delivered, work and labour, money paid, and on an account stated. The defendant pleaded to the whole declaration, first, except as to 102*l.* 2*s.* 9*d.*, parcel &c., non assumpsit; second, a set-off; third, payment into Court of 102*l.* 2*s.* 9*d.* Issue was joined on the first and second pleas; replication to the last plea of damages ultra, and issue thereon.

By order of Nisi Prius, in February, 1837, and with the consent of the parties, the jury found a verdict for the plaintiff, damages 200*l.*, costs 40*s.*, subject to the award of an arbitrator, to whom the cause and *all matters in difference* were referred; the costs to abide the event of the award, the costs of the reference and the award to be at his discretion, and no writ of error to be brought.

On the 27th April, 1837, the arbitrator (after reciting the order of reference) made his award in these terms:—"I do award, adjudge and determine, that, instead of the verdict entered as aforesaid, the verdict shall be as follows; that is to say, on both the issues joined between the parties, so far as the same apply to the several counts of the declaration in the said cause, except the count for money paid, the verdict is to be entered for the plaintiff; and, so far as the same apply to the said count for money paid, the verdict is to be entered for the defendant. And I assess the plaintiff's damages on the issues found for him at the sum of 19*l.* 5*s.* 1*d.* And I direct that the damages found by the jury shall be reduced to that sum. And I award and declare that neither of the parties has any claim against the other of them, for or in respect of any matters in difference between them. And I award that the costs of the said reference, and of this my award, shall be paid by the said defendant."

The award was taken up by the plaintiff, and served on the defendant the following day.

On the 8th May following, the defendant obtained a rule, calling on the plaintiff to shew cause why the award should not be set aside, on the following grounds:—First, that the award is bad, uncertain, and inconsistent, in awarding that on both the issues joined between the parties, so far as the same apply to the several counts of the declaration in this cause, except the count for money paid, the verdict is to be entered for the plaintiff, and so far

as the same apply to the said count for money paid, the verdict is to be entered for the defendant. Second, that the arbitrator having directed the verdict on the first issue, so far as the same applies to the count for money paid, to be entered for the defendant, ought not to have directed the verdict on the second issue to be entered for the defendant, merely so far as that issue relates to the count for money paid; but if he thought the defendant entitled to a verdict on any part of the second issue, he ought to have directed the verdict on the second issue to be entered for the defendant generally, or for some certain sum of money, and not to have ordered a verdict to be entered for the plaintiff on the second issue, except so far as it relates to the count for money paid. Third, that the arbitrator had no power or authority to confine the verdict for the defendant on the second issue to so much thereof as applies to the count for money paid.

Cresswell and *Swann* shewed cause in Trinity term last (*a*).—There is a preliminary objection to this rule; the reference being of the cause as well as of all matters in difference, the rule should have been applied for within the first four days in term after publication of the award; *Thompson* v. *Jennings* (*b*), *Rawsthorn* v. *Arnold* (*c*), and *Lyng* v. *Sutton* (*d*). The authority of *Allenby* v. *Proudlock* (*e*) may appear adverse to this objection, because the reference was in much the same terms as in this case; but the arbitrator there decided upon some matters in difference out of the cause, and the judgment of *Coleridge*, J. seems founded on this circumstance. Here the arbitrator has expressly found that there were no such matters in difference between these parties.

The award is objected to as uncertain and inconsistent, because the verdict is not directed to be entered for the defendant generally on the second issue, or for some certain sum. A verdict for defendant on an issue of set-off is always found generally, and not for any particular sum; and there is no inconsistency in finding on such an issue for the plaintiff as to one count, and for the defendant as to another. The arbitrator appears to have treated the plea of set-off as a distributive plea, to be applied separately to the several counts in the declaration. This is perfectly sensible and regular. Suppose a set-off had been pleaded separately to each count, there could then have been no objection to the arbitrator finding in favour of the defendant in the count for money paid, and for the plaintiff on all the other counts. The circumstance that the plea has not been repeated to each count can make no substantial difference. The general result of the award cannot be mistaken, it is found that there is a sum of 19*l.* 5*s.* 1*d.* due from the defendant to the plaintiff on a balance of accounts between the parties.

Sir *J. Campbell*, A. G., Sir *W. W. Follett* and *Peacock*, contrà, were told they need not argue the first point, the Court being of opinion that, as the reference was of matters in difference generally as well as of the cause, the application had been made in time.

The award is palpably inconsistent. The question may be simplified by putting out of consideration the issue of damages ultrà on the plea of pay-

(*a*) Before Lord *Denman*, C. J. and *Littledale*, J. *Patteson*, J. left the Court during the argument, and *Williams*, J. sat in the Bail Court for *Coleridge*, J., who was at Guildhall.

(*b*) 10 Moore, 110.
(*c*) 6 B. & C. 629.
(*d*) 2 Hodges, 106.
(*e*) 4 D. P. C. 54; *S. C.* 1 Har. & Wol. 357.

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ment into Court. The case will then stand thus: non assumpsit and set-off are pleaded generally to the whole declaration, containing four counts. If the defendant had a good set-off, of course he should have had the benefit of it. Now as to the first, second and fourth counts, the arbitrator finds on both issues for the plaintiff; that is, that he had a good cause of action, and that the defendant had no claim whatever for a set-off. Then as to the third count, the arbitrator finds that the plaintiff had no cause of action whatever; that is, that he never paid any money to the use of the plaintiff, and also that the defendant has a good set-off as to that count; that is, that the sum which the plaintiff owes the defendant shall be set off against the sum which the defendant *does not owe* the plaintiff. Thus the defendant gets no benefit whatever from his set-off; he had directed his plea generally as an answer to all the claims of the plaintiff, and the arbitrator applies it specially to the only claim which was unfounded, and required no answer. The issue on the set-off is as to all the counts, and the finding of the arbitrator is not commensurate with the issue. The costs of the action are to abide the event of the award, so that the mistake of the arbitrator is most material, for the master on taxation will have no power of giving the defendant the benefit of his success in respect of his set-off. *In the matter of Rider* v. *Fisher* (*a*) and *Cousins* v. *Paddon* (*b*), were also referred to.

Cur. adv. vult.

Lord DENMAN, C. J. now delivered the judgment of the Court.—This was an action of assumpsit. The declaration contained counts for goods sold and delivered, work and labour, money paid, and on an account stated. The defendant pleaded to the whole declaration; first, non assumpsit; second, a set-off; to which the plaintiff replied nil debet. The cause and all matters in difference were referred. The arbitrator has ordered a verdict to be entered on both pleas, so far as they relate to the count for money paid, for the defendant; and so far as they relate to the residue of the declaration, for the plaintiff, with 19*l.* 5*s.* 1*d.* damages. A rule nisi has been obtained to set aside this award, on the ground that the issue on the plea of set-off is not divisible; and we are of opinion that it is not. The defendant by that plea admits something to be due on each count of the declaration, and undertakes to prove a cross demand exceeding the aggregate amount of the sums so due. The issue under nil debet is not whether any sum is due from the plaintiff, but whether a sum is due from him exceeding or equalling the aggregate amount of his demands. Unless such a sum is due, the plea would be no bar to the action, although the evidence might reduce the damages. The arbitrator has evidently so treated the issue; for although, by the verdict as to the count for money paid, he finds that some set off was proved, yet by the rest of the verdict he finds that it does not equal the aggregate demands of the plaintiff on the other counts. And in this he is quite right, if the plea was to be held divisible, and applicable to each count separately; otherwise this absurdity might follow, that the demand of the plaintiff on each count, taken by itself, might be less than the set-off, so that the defendant would be entitled to a verdict on the whole of that plea, and yet the aggregate amount of the plaintiff's demands might far exceed the set-off, and so the set-off would be no bar to the action.

For these reasons we are of opinion, that as the set-off is pleaded to the

(*a*) 3 Bing. N. C. (*b*) 2 C. M. & R. 547; *S. C.* 1 Gale, 305.

whole declaration the issue on it is a single one, and that the plaintiff is entitled to a verdict, unless the defendant proves a set-off exceeding or equalling the whole of the plaintiff's aggregate demands, without regard to the particular amount under each count, or to any other issue on the record, applying only to a particular count. And this view of the question will not prevent the defendant from availing himself of any other defence stated on the record, such as payment, or the Statute of Limitations, by which he may be able so to reduce the plaintiff's aggregate demand, as that his set-off may lower the remainder, for to that extent the plea of set-off is divisible; or rather it must be found wholly for the defendant, and not partly for him and partly for the plaintiff. And there is no absurdity in this; for as the precise sums, both in the declaration and the plea, are immaterial, it signifies not whether the plaintiff's demand be reduced by failure of proof or by the establishment of one or more of the other pleas on the record, independent of the plea of set-off. If by either means the plaintiff's demand, as ultimately established, falls short of the defendant's demand, the issue on the plea of set-off ought to be found wholly for the defendant, so that in no case can the plea of set-off be properly said to be divisible.

But though we think that the arbitrator is mistaken in his view of the pleadings, yet we are of opinion that the party in whose favour that mistake has been made, viz., the defendant, cannot avail himself of it to set aside the award. We have, however, no power to correct the award, and therefore, if the *plaintiff* wishes it, this rule must be made absolute; but if he is content to pay the costs of the issue so wrongly found for the defendant, the rule must be discharged. The same course was pursued, in very similar circumstances, in *Ward* v. *Dean* (*a*). The record may be erroneous, but by the order of reference no writ of error can be brought, and the merits are in no respect affected.

The plaintiff having consented to pay the costs of the issue erroneously found for the defendant, the rule was discharged.

Rule discharged.

(*a*) 3 B. & Ad. 234.

ARCHER and others, Executors of ARCHER, *v.* MARSH.

A covenant by carriers to relinquish a certain portion of their carrying trade, and abstain from exercising it within certain limits for ever, on consideration of receiving one-third of the carriage for one year, of one description of goods, is not illegal as in restraint of trade, and the Court will not enter into inquiry as to the adequacy of the consideration.

COVENANT. The declaration stated, that by deed-poll, dated 1814, (reciting that the defendant and others had been carriers from London to Cambridge &c., and elsewhere, and that being desirous of disposing of a branch of their concern, in 1812, they had entered into a treaty with *Thomas Archer* for the disposal of that branch which was called "The Swaffham waggon concern," which they intended to give up to *Archer;* and it was stipulated that they should not, nor their heirs, executors, or administrators, at any time thereafter, exercise the trade or business of a common carrier from any or either of certain places mentioned, or parts adjacent thereto, to London or from London to any or either of such places or parts adjacent as were formerly considered as belonging to their Swaffham concern, and that they accordingly resigned such part of their business to *Archer:*) the defendant and others for the consideration therein mentioned, for themselves severally

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and respectively, and for their several respective heirs, executors &c., covenanted &c. with *Thomas Archer*, his heirs, executors &c., that they, their heirs, executors &c., would not jointly nor separately, nor in partnership with others &c., *take in and convey* any goods from London to any of such places whatsoever, or any other place contiguous thereto, and as were formerly connected with the said Swaffham waggon and *usually carried thereby*, or take in and convey any butter, goods, or other articles of any description whatsoever, from Swaffham &c., or any or either of such places &c., or any other place &c. near thereto, to London, upon any account or pretext whatsoever; which said places were formerly connected with their Swaffham concern, and for the relinquishment of the carriage to which they had received the consideration therein mentioned. Breach, that the defendant had taken in and conveyed divers goods from London to Swaffham &c. &c. &c., which were before the making of the said deed connected with the said Swaffham waggon concern, and usually carried thereby, to wit, East Redham, West Redham &c., and had taken in and conveyed divers goods from Swaffham &c. &c. &c. to London, contrary to the tenor and effect of the said deed-poll and covenant. From the deed, which was set out on oyer, it appeared that the consideration was 1*s.* per firkin upon all butter carried by *T. A.* within one year, being one-third of the carriage of such butter &c. which was recited to have been paid.

The sixth plea pleaded that the defendant had carried nothing but rabbits, and that they were not within the covenant, not having been usually carried by the Swaffham waggon, and that for the relinquishment of the carriage of them no consideration had been paid; to which there was a special demurrer, assigning for cause that the defendant was precluded by his covenant from conveying rabbits as well as any other articles. Joinder in demurrer.

Wightman (*a*) in support of the demurrer.—The question is, whether the plea that defendants carried nothing but rabbits is good. The instrument declared on is very inartificially worded, but the meaning is apparent, and the covenant clearly is absolute not to convey any goods whatsoever. There, as far as relates to the goods, the sense ends; the covenant then goes on to assign the places from which the defendants were to be excluded, which are the places "connected with the Swaffham waggon, and usually carried thereby," meaning such places as were in the habit of carrying thereby, that is, using it as their conveyance, referring to the places, not to the goods. Then as to the declaration, the first point that will be made is, that the breach is not well set out, but the demurrer being to the plea the declaration is to be considered as if demurred to generally.—[*Wallinger* stated that the objection to the breach was for not stating that the goods were taken in the defendant's own carriage, *as a common carrier*.]—The words in the declaration are those used in the deed, which is set out on oyer, and that is sufficient. Next as to whether or not the deed itself is good in law, as being in restraint of trade. Here it is to be observed, firstly, that the covenant is founded on a valuable consideration; secondly, that it does not go so far as to amount to a general restraint of trade. As to the consideration mentioned, the Court cannot say whether or not that is sufficient; it is not for them to judge, the parties having decided for themselves. As to the second point, Lord

(*a*) In Michaelmas term, 1836.

Macclesfield, in *Mitchell* v. *Reynolds* (*a*), lays it down, that a restraint of this kind to be valid must be limited either in time or place, but it is not necessary that it should be limited in both respects; and many other cases establish the same principle, *Morris* v. *Colman* (*b*), *Davis* v. *Mason* (*c*), *Gale* v. *Reed* (*d*).—[*Patteson*, J.—These cases were cited in *Hitchcock* v. *Coker* (*e*), now standing for argument in the Exchequer Chamber.]—*Bunn* v. *Gye* (*f*) was a case where the agreement in question excluded the party from practising as an attorney within London or 150 miles of it, yet that was held to be good. *Horner* v. *Graves* (*g*) is quite different in principle from the present; the agreement there was held to be bad, because the restraint was much greater than could be necessary for the protection of the contracting party. That was a case where a dentist bound himself not to practise anywhere within a circle whose diameter was 200 miles. In *Chesman* v. *Nainby* (*h*) an agreement similar to the present was held good, although the restraint was not only against exercising a trade by the contracting party within a fixed distance of the then residence of the other party, but also within the same distance of any residence to which that party, her executors or administrators, might think proper to remove. *Leigh* v. *Hind* (*i*) and *Homer* v. *Ashford* (*k*) go to shew that the Courts do not discountenance agreements of this nature.

Wallinger, contrà.—The objection to the declaration is not that the breach does not follow the express words of the covenant, but that it does not shew their intent and effect; taking the whole of the deed together, it is clear that the words "carry and convey" mean "carry and convey as a carrier for hire;" the breach therefore is bad, as only shewing that the defendant carried and conveyed, not that he carried as a carrier for hire. Then the cases go clearly to shew that, if the words are in themselves insufficient, the breach will not be made good by insertion of the general words at the conclusion, contrary to the tenor and effect of the said covenant &c., that is only matter of conclusion, and will not serve without premises; *Clayton* v. *Kynaston* (*l*), *Anonymous* (*m*). In *Warn* v. *Bickford* (*n*), *Richards*, C. B., in giving the judgment of the Court, says, "The breach is assigned in the words of the covenant, but we think that that in this case is not sufficient, for it does not bring before the Court the subject-matter of complaint." Then as the plea states that rabbits did not make part of the covenant, and that for them there was no consideration, and as this statement is admitted by the demurrer, the plea clearly affords an answer to the declaration. The words of the covenant "carried thereby" must apply to things and not to places.—[*Coleridge*, J.—The words are relinquishment of the carriage *to* which, not *of* which.]—Taking the whole of the words together they must apply to things; besides, the consideration arising from butter only shews it was intended to restrict the carriage of that only, and of goods of the same description. This covenant also is illegal as being in restraint of trade; no case comes up to or

(*a*) 1 P. Wms. 181.
(*b*) 18 Ves. jun. 437.
(*c*) 5 T. R. 118.
(*d*) 8 East, 80.
(*e*) 2 Har. & Wol. 464.
(*f*) 4 East, 190.
(*g*) 7 Bing. 735.
(*h*) Bro. P. C. 234.
(*i*) 9 B. & C. 774.
(*k*) 3 Bing. 322.
(*l*) 2 Salk. 574.
(*m*) Sir T. Jones, 125.
(*n*) 7 Price, 550.

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near the present. The deed transfers the whole business of common carrier throughout a particular district for ever, and the consideration is the amount of 1*s.* upon the carriage of butter for one year only. In none of the cases cited has the restraint in point of time been wholly unlimited; the utmost limitation has been during the life of one of the parties, and here there is nothing in the agreement whereby the covenant may be restrained, as by reference to the recital was done by the Court in *Gale* v. *Reed*.

Wightman, in reply, was stopped by the Court, who intimated that they thought the breach sufficiently set out by following the words of the covenant.

Cur. adv. vult.

Lord DENMAN, C. J., now delivered the judgment of the Court.—This case arose on a covenant entered into between the plaintiffs and the defendant, that the latter, for considerations specified, should relinquish to the former a certain portion of their carrying trade, and abstain from exercising it within certain limits. The breach alleged was, that the defendant had still continued it; and as the defence rested on the supposed illegality of the agreement as in restraint of trade, which nearly resembled the case of *Hitchcock* v. *Coker* (*a*), decided in this Court in last Easter term, and pending in the Court of Error at the time of the argument, it was determined to postpone our judgment till that case should be finally decided. The particular objection to the agreement, which was common to the present case and that above mentioned, was, that the restraint was much more extensive than was necessary for the full protection of the plaintiff, the purchaser of the good-will of the business. The Court of Error has reversed our judgment, on the principle that the restraint of trade in that case could not be really injurious to the public, and that the parties must act on their view of what restraint may be adequate to the protection of the one, and what advantage be a fair compensation for the sacrifice made by the other. We may observe, that our own opinion, when *Hitchcock* v. *Coker* was under discussion, leant much the same way, but we thought ourselves bound by the authority of *Horner* v. *Graves* (*b*), where the Court of Common Pleas entered into an inquiry into the terms of the contract between the parties. That case appears to be overruled by the late decision in error. We not only bow to its authority, but think that in this respect it establishes a more correct and a much more convenient rule of law. Our judgment, therefore, must be for the plaintiffs.

Judgment for the plaintiffs.

(*a*) 2 Har. & Wol. 464. (*b*) 7 Bing. 735.

TAYLERSON *v.* PETERS and another.

An outgoing tenant, after the determination of his demise, quitted the premises, leaving thereon, without asking permission, a cow and some pigs. There were no facts to show what was his object in so leaving them:—*Held*, that this did not constitute such a possession of the premises as to enable the landlord to distrain under 5 *Anne*, c. 14, ss. 6 & 7.

Quære, whether, after issue joined in an action for seizing the plaintiff's cattle, the landlord of the plaintiff can ratify the distress under which the cattle were seized.

TRESPASS for seizing and carrying away cattle of the defendant. Plea, not guilty. At the trial before Lord *Denman*, C. J., it appeared that the

plaintiff, in 1830, had come into occupation of a farm as tenant to one *Turton*, to whom he paid rent up to 1831, when he received a notice from one *Jenkins*, that the legal estate was in him, and rent was to be paid to him, which was accordingly done. At Michaelmas, 1834, he received notice to quit from *Turton*, pursuant to which the whole of the land was given up by Lady-day, 1835. The house was to have been given up, on the 13th May in that year, to the incoming tenant, whose tenancy had already commenced, but it was not given up till the 22nd May. Upon quitting at that time the plaintiff left on the premises a cow and some pigs, without asking leave to do so. After the plaintiff had left the premises the defendants distrained the cattle left on the premises, under a warrant signed by the agent of *Turton*, the original landlord of the premises, and the distress was sold.

On the 9th June, 1835, the plaintiff commenced this action. In July that year *Jenkins* informed the plaintiff that he would support him in the action. In Hilary term, 1836, issue was joined, and in February, 1836, a few days before trial, *Jenkins* signed a recognition of the distress.

At the trial two points were made for the plaintiff; first (*a*), that the defendants could not avail themselves of the recognition of the distress by *Jenkins*, being after action brought; second, that the plaintiff was in possession within the meaning of 8 *Anne*, c. 14, s. 6, so as to authorize the landlord to distrain. Verdict for the plaintiff. The learned judge thereupon caused a verdict to be entered for the defendants, giving leave to the plaintiff to move to enter a verdict for himself. A rule nisi having been obtaine accordingly,

Cresswell and *Wightman*, in Trinity term, shewed cause.—By stat. 8 *Anne*, c. 14, ss. 6 and 7, landlords are enabled to distrain for rent in arrear within six months after the determination of the lease, provided the distress be made *during the possession* of the tenant, from whom the arrears are due. In order to comply with the words of that statute it is not necessary that the outgoing tenant should be in possession of all the premises demised. It is enough if that part wherein the distress is made be still in his possession; *Nuttall* v. *Staunton* (*b*), *Beavan* v. *Delahay* (*c*). In this case it is true the dwelling-house had been given up, but nothing appears as to the place in which the cattle were; no symbol of even yielding up possession, such as the delivery of a key, is found to have existed, and the cattle were left without the permission of any one. Such a state of things can be no otherwise described than by saying that the place occupied by the cattle was in the possession of the plaintiff.

Alexander and *W. H. Watson*, contrà.—The incoming tenant was in occupation at the time in question. All that appears as to the cattle of the plaintiff was, that they were then actually there. That fact alone is not sufficient, there must be a complete, unequivocal, exclusive possession, at all events of the place where the cattle are, to justify a distress. An ambiguous or con-

(*a*) The arguments on this point are not reported, the decision of the Court having proceeded wholly on the second point. The authorities cited for the defendant were *Potter* v. *North*, 1 Wms. Saund. 347 c. n. 4; Gilbert's Law of Distress, 29; for the plaintiff, *Wilson* v. *Barker*, 4 B. & Ad. 614; *Hull* v. *Pickersgill*, 1 B. & B. 282.

(*b*) 4 B. & C. 51.

(*c*) 1 H. Bl. 5.

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structive possession is not sufficient. However, the circumstances here do not even amount to that, the presence of the cattle on the premises was a mere act of trespass. In the cases cited, on the contrary, the relation of landlord appeared still to have existed.

Lord DENMAN, C. J.—The first point made, whether the ratification of a distress after action brought would be valid, is one of great importance. But it is not necessary to consider (*a*) it now, because I am of opinion that there does not appear to have been such possession of the premises as would enable the landlord to distrain. Had the cow and pigs been left on the premises for the purpose of keeping possession, they might have been quite sufficient to accomplish that object. But under the circumstances we cannot presume that the plaintiff had any such purpose; he quitted the premises without asking permission to leave the cattle, and without any claim of possession. Unless, therefore, the mere fact of the cattle being there constitutes a possession by the plaintiff, (and I do not think that it does,) there was no such possession as justified the distress.

LITTLEDALE, J.—The conduct of the plaintiff himself, as far as we are informed, seems to have amounted to a complete abandonment of possession; he gives up the farm, leaves it, and never returns. And there is nothing to shew that the cattle were left with a view to continue the possession.

PATTESON, J.—In *Beavan* v. *Delahay* the possession was by the custom of the country, and in *Nuttall* v. *Staunton* by the landlord's permission. A possession to satisfy the words of the act may perhaps be either tortious or lawful, but it must in either case be to the exclusion of other persons; that was not so here.

WILLIAMS, J., concurred.

Rule absolute.

(*a*) See 2 Leon. 196.

TAYLOR *v.* DEVEY and another.

A custom on the occasion of perambulating the boundaries of a parish in Rogation week to enter a particular house within the parish, but neither upon the boundary line nor in any way necessary to the course of the perambulation, cannot be supported.

TRESPASS for breaking and entering the dwelling-house of the plaintiff in the parish of St. Bride, London. Plea, that the dwelling had been immemorially part of the said parish, and that there was an immemorial custom for all and every the parishioners for the time being to go through the dwelling-house on their perambulations of the boundaries of the parish upon Thursday in Rogation week, in every third year; and that immemorially the said parishioners for the time being have used and been accustomed, in exercise of the custom aforesaid, to go through the dwelling-house upon their perambulation of the boundaries of the said parish on Thursday in Rogation week; wherefore the defendants, being two of the parishioners, on the Thursday in Rogation week, in the year 1833, being a third year, in the exercise of the custom aforesaid, went through the dwelling-house upon the per-

ambulation by the parishioners of the said parish using the said custom there, for the purpose and on the occasion aforesaid.

Replication, traversing the custom, and issue joined.

At the trial before Lord *Denman*, C. J., at the London sittings after Michaelmas Term, 1835, the custom was proved as laid. It also appeared that the plaintiff's house was not upon the boundary line, which actually lay across some adjoining premises.

Verdict for the defendants.

Cresswell, in Hilary Term, 1836, obtained a rule nisi for a new trial, on the ground that the learned judge had misdirected the jury, by telling them that the contents of parochial books and evidence of reputation were not admissible, and on the ground that if the plea imported that the house was on the boundary line, such plea was not proved. And also for judgment non obstante veredicto, on the ground that, if the plea imported that the house was not on the boundary line, the plea was bad, the custom set up being unreasonable.

Sir *J. Campbell*, A. G., *Barstow* and *White*, (in Trinity term, May 30,) shewed cause.—The custom as alleged is good, although the plea does not state the house to have been upon the boundary line. A custom for parishioners, on perambulation of boundaries in Rogation week, to go through the close of a private individual, is good; *Goodday* v. *Michel* (*a*), *Viner's Abr.* tit. Perambulation 5. No reason can be assigned why such custom on such occasion to go through a house should be invalid. It is objected that the plaintiff's house was not on the extreme boundary line. But there is no authority for saying, that the perambulation must proceed along the line itself. Natural obstacles may occur to make that impossible.—[Lord *Denman*, C. J.—If such obstructions exist, should their existence not have been stated?]—It is enough to show that the perambulation has been from time immemorial in a certain line. If a legal origin can be presumed, that is sufficient. At the time of the commencement of the custom a house may have existed upon the line, and not on the place in question, or the course of the perambulation may have been the subject of arrangement with the owners of the land for the time being. If the plaintiff should succeed, the perambulation must be stopped, because the custom as proved would afford no justification for going through the house now situated upon the actual boundary line. In *Coke's Entries* (*b*) a justification such as the present was held to be substantially good, although there badly pleaded. In *Pain* v. *Patrick* (*c*) it appears that the inhabitants of a vill may well allege a right of way by prescription to a market. So in *Fytch* v. *Rawlins* (*d*), a custom by the inhabitants of a parish to play at all lawful games in the close of *A.* at all seasonable times, was held to be good.

As to the point with respect to a new trial, the plea did not allege that the house was on the boundary line, but merely that it was in the parish. A custom to pass through it was set out, which was denied by the defendant, and duly proved at the trial. The defendant therefore is not entitled to a new trial. There was no misdirection. The learned judge told the jury, that in

(*a*) Cro. Eliz. 441; *S. C.* Owen, 71.
(*b*) 651—2.
(*c*) 3 Mod. 289.
(*d*) 2 H. Bl. 393.

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house, which is neither upon the boundary line, nor in any manner wanted in the course of the perambulation, cannot be supported.

On principle, therefore, the custom laid down is bad in law; and the authority of the case, as to the form of pleading, cannot go for much, as the plea was set aside for two fatal faults in other respects. The report contains several references to the Year Books, and one to *Fitzherbert's Natura Brevium;* none of which have any bearing on this objection. The Book of Entries (p. 158) is also quoted, but neither in that page, nor in any other, is light thrown upon it. For the reasons given, we think ourselves bound to give our judgment for the plaintiff.

Rule absolute to enter judgment for the plaintiff, *non obstante veredicto.*

The QUEEN *v.* The Churchwardens of BRANCASTER.

Nov. 8.

Mandamus to churchwardens to make a rate, to re-pay money lent under the Church Building Acts, on the credit of the rates.

Return, that a fiat in bankruptcy had issued against one of the lenders, who were the prosecutors of the writ.

Plea, that the sum lent was advanced out of money vested in the lenders as trustees for &c. (naming the parties), and the bankrupt was only interested as trustee.

On special demurrer, assigning for cause that the instrument creating the trust ought to have been set out, or the manner of creating it,

Held, that the plea as between these parties was good.

MANDAMUS to the churchwardens of the parish of Brancaster, in Norfolk. The writ recited, that after the stat. 58 *Geo.* 3, c. 45, and also after stat. 59 *Geo.* 3, c. 134, (the Church Building Acts,) to wit, on or about 9th May, 1832, the then churchwardens of the said parish, with the consent of the vestry and of the bishop of the diocese, and of the then incumbent, did borrow from *G. Morse* and *R. J. Turner*, upon the credit of the church-rates, a sum, to wit, 146*l.*, then necessary for &c., pursuant to the last-mentioned statute, and the further sum of 54*l.* necessary for &c., pursuant to the first-mentioned statute, and that by a deed-poll dated 9th March, 1832, the then churchwardens charged the parish and church-rates with the repayment of the said sum of 200*l.* and interest (stating the times of payment), but that the said sum and interest were wholly unpaid, and the time for payment elapsed; and that *Morse* and *Turner* had applied to the churchwardens to raise, by rate, a sum sufficient to pay them; yet the churchwardens had refused, though the rates already made were not sufficient. The writ then commanded the churchwardens to make a rate or rates to pay &c., according to the statutes and the agreement, or to shew cause &c.

The defendant returned, first, a denial of the borrowing; secondly, that since 9th May, 1832, to wit, 16th May, 1834, a fiat in bankruptcy was duly issued against the said *R. J. Turner*, under which he has been duly found and declared a bankrupt, and which fiat is still subsisting.

The prosecutors, first, traversed the denial, concluding to the country; and as to the residue they answered, that the said sums of 146*l.* and 54*l.* "were lent by the said *G. Morse* and *R. J. Turner*, as trustees for other persons, that is to say, for &c. (naming the parties), to the churchwardens of the said parish, out of monies belonging to and vested in the said *G. Morse* and *R. J. Turner*, as trustees of and for such other persons as aforesaid; and that the said *R. J. Turner* was and is interested in the said monies only as such trustee." Verification.

The defendants joined issue on the traverse; and as to the residue demurred, assigning for cause, that the prosecutors had not stated any deed or instrument under which the monies were vested in them as trustees, nor had shewn with certainty that they were so vested, or in what manner such

trust was created; and that if the churchwardens traversed the allegation, it would be a traverse of matter of law. Joinder.

Kelly, in support of the demurrer.—It is not sufficient merely to state that these parties were possessed of this money only as special trustees. The facts ought to have been stated which shew that to be so, in order that the defendants might have an opportunity of taking issue upon them. They could not take issue generally upon the fact whether these parties were trustees or not. The answer to the return could only be held sufficient on the assumption, that in no case could money held by a bankrupt, as trustee, pass to his assignees. But that assumption is incorrect. A banker is a trustee as to the money held by him. Still, unless that money be so held as to be distinguishable, it would, in case of bankruptcy, pass to his assignees. [*Patteson*, J. At the time of this bankruptcy there was nothing but a debt due; one debt cannot be mixed up with another debt.] If the money had been lent by *Turner* in his own name, and securities taken in his own name, the whole would pass to his assignees. It may be objected, that the return does not state the trading, assignment &c., but that is not necessary, as against these parties, at all events. The Court will presume that the proceedings were regular.

Peacock, contrà, was not called on.

Lord DENMAN, C. J.—I think it quite clear that, as between these parties, the fact that the prosecutors were trustees is sufficiently set out.

PATTESON, WILLIAMS, and COLERIDGE, Js. concurred.

Judgment for the Crown.

The QUEEN *v.* GUEST and others.

Real property ought to be rated to the poor according to its actual value as combined with the machinery attached to it, without considering whether that machinery be real or personal property, so as to be liable to distress or seizure, or whether it would descend to the heir or executor, or belong, on the expiration of a lease, to landlord or tenant.

ON appeal by the defendants against a rate for the relief of the poor of the parish of Merthyr Tydvil, in the county of Glamorgan, the sessions, after amending the rate, confirmed it, subject to the opinion of the Court upon a case, which was subsequently withdrawn. Another case having been substituted for it, was argued in Hilary term, January 25th. The circumstances of the case are not material to the principle laid down by the Court.

Maule and *J. Evans* in support of the rate.

Sir *J. Campbell*, A. G. and *Powell*, contrà.

Lord DENMAN, C. J. in Hilary term, 1838, delivered the judgment of the Court (*a*). This was an appeal against a rate, on the ground that many

(*a*) Lord *Denman*, C. J., *Littledale*, *Williams*, and *Coleridge*, Js.

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articles of machinery employed by the appellants in their manufactory, were personal property, and not subject to be rated. The sessions proposed numerous questions to us, but we did not think their statement so full as it might have been, and we desired to see a copy of the rate, in the hope that we might be enabled, from the description there given, to specify the articles that ought to be included. In this we are disappointed, and can only direct that the rate should finally stand on the general principle which we have lately had occasion to lay down (*a*), that real property ought to be rated according to its actual value, as combined with the machinery attached to it, without considering the question whether that machinery be real or personal property, so as to be liable to distress or seizure under a *fieri facias*, or whether it would descend to the heir or executor, or belong, at the expiration of a lease, to the landlord or tenant.

The rate must therefore be sent back to the sessions, to apply this principle.

(*a*) *Rex* v. *The Birmingham and Staffordshire Gas Light Company*, *ante*, 224.

DOE *d.* STEVENS *v.* LORD.

Nov. 25.

A plaintiff in ejectment sued out a writ of possession upon a judgment more than a year old, without having previously issued a writ of *scire facias*, and obtained possession. The writ was set aside by a judge at chambers, but the plaintiff refused to give up possession. A rule nisi for a writ of restitution having been obtained, the Court refused to make it absolute in terms, but granted a rule absolute, directing the plaintiff to restore possession of the lands.

EJECTMENT having been brought for the lands in question by the mortgagee against the heir at law of the mortgagor, the plaintiff, at the Spring assizes for Northamptonshire, 1833, obtained a verdict, upon which judgment was signed the ensuing Michaelmas term. A writ of possession issued in December, 1834, but was not acted upon. In June, 1837, another writ of possession was issued, which was executed by the sheriff, and the plaintiff obtained possession of the lands.

This last writ was set aside by an order of *Williams*, J. for irregularity, the plaintiff not having revived the judgment by *scire facias*. The order contained no provision for restoring the possession, which the plaintiff still retained. Whereupon a rule nisi was obtained, calling on the plaintiff to shew cause why a writ of restitution should not issue to the sheriff, commanding him to restore possession of the lands, and why all further proceedings upon the writ of possession should not be stayed; against which

Warren now shewed cause.—A writ of restitution cannot issue so long as the judgment stands unimpeached. All right in the premises by the defendant is disaffirmed by the judgment (*a*). In *Doe* v. *Williams* (*b*), the judgment had been set aside. All the text-books on the subject refer to 2 *Lill. Pr. Reg.* tit. Restitution, which states that the writ lies where a judgment is reversed by writ of error, and that the Court which reverses the judgment gives, *upon the reversal*, a judgment in restitution. The form of the writs also states that the judgment was irregularly obtained, and that the writ of possession thereupon issued improvidently and unjustly (*c*). That cannot be averred in the present case. [*Coleridge*, J. Do you contend merely against

(*a*) *Doe* v. *Butcher*, 3 M. & S. 557.
(*b*) 2 A. & E. 381.
(*c*) Tidd's Appendix; 2 Lill. Ent. 635, tit. Execution.

the form of the rule, or that the party ought not to be directed to restore ?] It is not necessary to contend against the latter application, as this rule was not drawn up in the alternative.—[Lord *Denman*, C. J.—The Court is in the constant habit, when a party asks in an informal manner for something to which he is entitled, to mould the rule for him.]—Here the right is with the plaintiff, and as he has peaceably obtained the possession to which he is entitled, the Court will allow him to retain it; *Crowther* v. *Ramsbottom* (*a*), *Taylor* v. *Cole* (*b*), *Taunton* v. *Costar* (*c*), *Turner* v. *Meymott* (*d*).

Waddington.—The judgment here having been allowed to sleep for so long, the law presumes it to have been satisfied; and the plaintiff will not be allowed to retain what he wrongfully obtained under colour of the process of the Court. In *Goodright* v. *Noright* (*e*), where a possession had been improperly obtained, a writ of restitution was awarded.—[*Coleridge*, J.—There the judgment had been set aside.]—But in *Withers* v. *Harris* (*f*), that does not appear to have been the case, and the circumstances were similar to those in the present case, and there the execution was set aside as irregular, because no *scire facias* had issued, and restitution was granted. At all events, if the rule cannot be made absolute in its present form, the Court will mould it so as to afford the party the proper remedy.

Lord DENMAN, C. J.—This rule may be moulded into one directing the lessor of the plaintiff to restore the possession which he has irregularly obtained. He has here enforced a judgment by a writ of possession, which has been since set aside. That writ is therefore now a nullity, and the party cannot be allowed to retain the possession obtained under it.

PATTESON, J.—I cannot at all assent to the position, that a party may retain possession which he has obtained without the authority of the Court.

COLERIDGE, J.—This case is quite different from those where a landlord enters at the end of a term. Here the party has availed himself of the process of the Court, and that process issued irregularly. He cannot therefore retain his possession.

Rule absolute for the lessor of the plaintiff to restore possession of the lands &c. taken possession of by the sheriff under a writ of *hab. fac. poss.* set aside for irregularity, without costs.

(*a*) 7 T. R. 654.
(*b*) 3 T. R. 292.
(*c*) 7 T. R. 431.
(*d*) 1 Bing. 158.
(*e*) Barnes, notes, 178.
(*f*) 2 Ld. Raym. 806.

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all probability the parish books would not have proved the custom, and that evidence of reputation was not admissible to prove a particular fact.

Cresswell and *W. H. Watson*, contrà.—The only authority which has been cited in support of the validity of this custom is the case of *Goodday* v. *Michel*, or rather a solitary expression in that case, because there the decision was against the plea. Suppose no occasion to exist for such a custom, it is clear that the Court must of necessity hold it to be unreasonable, because, being an invasion of a dwelling-house, it is opposed to the principles of the common law. Therefore some occasion for its existence is necessary. The mere practice of perambulating the parish boundary does not furnish such an occasion. In order to do so it must appear that it was either necessary or convenient, for the purpose of that perambulation, to pass through the plaintiff's house. It is not shewn that it was either one or the other. It does not appear that the boundaries could not be ascertained otherwise than by passing through the plaintiff's house. The presumption is rather the reverse, since this house was neither upon nor immediately adjoining the boundary. Any custom for the parishioners to do something on a particular day is not therefore necessarily good. *Reynolds's case* (*a*), where a custom to find meat and drink, to enable the parishioners to support the fatigues of making the perambulations, was held to be contrary to law. Yet according to the reasoning on the other side such custom ought to have been supported, for the meat and drink might have been given in commutation of the right to pass through the dwelling-house. Some invasions on the land of another may doubtless be justified under a custom, such as that for fishermen to dry their nets on land adjoining the sea (*b*); but a reason is given for that, by which all customs may be judged, that it was for the public good. On that principle, a custom to turn a plough on the land of another, or the custom set up in *Fytch* v. *Rawlins*, may be supported.

On the question of the boundary of a parish, reputation would certainly be admissible.

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Lord DENMAN, C. J., this term delivered the judgment of the Court (*c*).—In the course of trying the existence of a custom for all the parishioners of St. Bride, on their annual perambulation of the parish bounds, to go through the plaintiff's house, though not in the line of the parish boundary, the plaintiff's counsel observed to the jury, that the defendant had given no evidence of the contents of parochial books on the subject, nor any evidence of reputation. In summing up I observed on this statement, and am supposed to have said, that such evidence would have been inadmissible. A rule nisi had been obtained, on the ground that herein I misdirected the jury, because the existence of a public right of this nature may be proved by reputation.

We agree that if a judge misleads a jury on any question of law, the losing party is entitled to a new trial, for the jury must be supposed to adopt the law as expounded to them, and their verdict may have proceeded on the erroneous direction; nor can any calculation be permitted of the extent to which the error may have operated.

(*a*) Moore, 916.
(*b*) Bro. Abr. tit. "Custom," 46.
(*c*) Lord *Denman*, C. J., *Littledale*, *Patteson*, and *Williams*, Js.

the line of the said canals and navigations in such respective parishes &c., and not otherwise or in any other manner." It was also stated that the Leeds and Liverpool Canal had been finished, and a communication been made between Leeds and Liverpool, terminating at the North Lady's Walk in Liverpool. The Company have, since the passing of the 10 *Geo.* 3, c. cxiv. and also of the 59 *Geo.* 3, c. cv., purchased different pieces of land, in which they have cut the branches and basins hereinafter mentioned under the general powers contained in the above acts, branching out at several points from the original parliamentary line, towards and into the town of Liverpool. Upon the lands so purchased, and upon the sides of the branches, the Company have wharfs, which are of considerable advantage to the public and those trading upon the canal, and to the Company; but the Company do not take any additional tolls for such cuts, other than wharfage upon the wharfs adjoining such cuts.

The Company are in the occupation, within the parish of Liverpool, of a warehouse, shed, manager's house, cranes, and weighing machines, which, according to the value of similar adjacent property, are of the annual value of 524*l.* As to the value of the above property there is no dispute, and the said rate is right in respect thereof.

The Company are also in the occupation, within the parish of Liverpool, of a portion of their canal, basins, and towing-paths, being in the original and parliamentary line, which canal &c. contain 51,555 superficial square yards; and the land, if it is to be estimated according to its value as agricultural land, at the time of the passing of the 10 *Geo.* 3, should be rated at 30*s.* an acre only, and the amount at which the Company should be rated on this principle would amount to 16*l.* If it is to be estimated as mere land according to the value of adjoining land at the present time, its value is 1806*l.* 3*s.* 6*d.* If it is to be estimated as land used for navigation, on a criterion of what the land so used would let for, supposing the party taking it to form his calculation from the amount of the tolls received on the whole line of the canal (deducting the necessary expenses), and applying the profits to the portion of the canal in the parish of Liverpool, the amount to which the Company would be rateable is 698*l.* 2*s.* 9*d.* If it is to be estimated as land used for navigation, upon the criterion of what it would let for on a calculation formed upon the amount expended in rendering the land within the parish fit for navigation, as it now exists, the land is of the annual value of 3612*l.* 7*s.*

Besides the said property in the original parliamentary main line of the canal, the Company are in the occupation of the branches and basins so cut by them in the land bought by them as aforesaid, which consists of a certain basin and three branches, with wharfs on each side, in the parish of Liverpool, to the eastward of the said canal, but communicating with it. The first of the three branches was made in the year 1801, and was afterwards enlarged; the second was made in the year 1816, and was enlarged in 1824; the third was made in 1828. Upon parts of the first and second branches the Company have wharfs in their own occupation for the use of the traders on the canal; on the third branch the Company have wharfs which are in the occupation of tenants on parol demises from year to year. The tenants have the sole privilege of navigating the said third branch, but the land of the third branch is not demised by the Company. The tenants would not pay the same amount of rent, unless they enjoyed the privilege of navigating the

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(*a*) Moore, 916.
(*b*) Bro. Abr. tit. "Custom," 46.
(*c*) Lord *Denman*, C. J., *Littledale*, *Patteson*, and *Williams*, Js.

basins, within the said borough of Liverpool, communicating with the said principal line, and also quays, wharfs, and various other property connected with the same. It may be proper, for the sake of clearing the way, to observe, that as to the sum of 524*l.*, parcel of the 3400*l.*, assessed on a warehouse, manager's house, shed, and cranes, the rate is admitted to have been properly imposed, being estimated according to the annual value of similar adjacent property. The contested points we shall take in the order in which they occur in the statement of the case. But it will be necessary now to advert to those parts of the different acts of parliament upon which the questions depend, and these will be found to be the clauses exempting "the rates, tolls and duties," from the payment of rates. The original act (10 *Geo.* 3, c. cxiv.) incorporating the said Company, and empowering them to take rates, tolls and duties upon the canal, has the following exempting clause (sect. 49): "And be it also further enacted and declared, that the said rates, tolls and duties, shall at all times hereafter be exempted from payment of any taxes, rates, assessments, or impositions whatsoever, any law or statute to the contrary notwithstanding, other than such taxes, rates and assessments, as the land which shall be used for the purpose of the said navigation would have been subject to if this act had not been made." The next act (23 *Geo.* 3, c. xlvii.) which was passed for one of the purposes before alluded to, namely, for incorporating the river Douglas navigation with the said canal, and for amending the first-mentioned act, repeals the exempting clause above set forth, and substitutes the following: "And be it further enacted and declared, that the said several navigations, cuts or canals, and every part thereof, and the said tolls, rates and duties to be taken upon the same, or any part thereof, under the authority of this or either of the aforesaid acts, shall at all times be exempted from the payment of any taxes, rates, assessments, or impositions whatsoever, other than and except such taxes, rates and assessments as the land which hath been or shall be used for the purpose of such navigations, cuts or canals were or would have been subject to if this act had not been made; and that such navigations, cuts or canals shall not be subject or liable to the payment of any taxes, rates or assessments (save and except such taxes, rates and assessments as have been and now are usually charged and assessed thereon), any law or statute to the contrary notwithstanding, but nothing in this clause shall be construed to exempt any quay, wharf, warehouse, or other house, from the payment of any rates, taxes or assessments." The 59 *Geo.* 3, c. cv., which was passed chiefly for effectuating another of the purposes before alluded to, namely, a junction between the Leeds and Liverpool and the late Duke of Bridgwater's canal, after continuing the provisions of the former acts, *except such as were thereby repealed or altered*, contains the following section: "And be it further enacted, that all and every the lands, dwelling-houses, wharfs, quays, warehouses, lockhouses, and other houses of and belonging to the said Company of Proprietors, shall be rateable and chargeable to the maintenance of the poor, and to all parochial rates and taxes in the several parishes, townships or places where they are respectively situate, the lands according to the quantity and quality, and the dwelling-houses, wharfs, quays, warehouses, lockhouses, and other houses according to the nature and respective uses, dimensions and descriptions thereof, and shall be charged and assessed in like manner as lands of a like quality, and as dwelling-houses, warehouses, lockhouses, and other houses of

like and similar size, nature, dimensions or descriptions in the respective parishes, townships or places where the same shall be situate, are or shall be assessed and charged." The first question arises upon the portion of land within the parish of Liverpool occupied by the canal, basins, and towing-path, of which the extent is given from actual admeasurement in square yards. If it had not been for one observation of the counsel for the appellants (hereafter to be noticed), it might have been doubtful whether it was meant to be argued that this land so employed is not liable to be rated *at all*. But be that as it may we think the language of the exempting clauses places the matter beyond a doubt. If indeed those clauses had simply exempted the tolls *without more* it might have been contended with great reason, that as land is rateable only in respect of the profit it produces, and as tolls are the profit of land used as a canal, the subject-matter for the rate being taken away, no rate could be imposed, even though the land itself had not been expressly exempted. And this was the precise ground of the decision of the Court in the case of *Rex* v. *Calder and Hebble Navigation Company* (*a*). But here the tolls are exempted, while the land used for the navigation is left subject to a rate. And if in a case so plain, authority were requisite, it would not be wanting, from the construction put by the judges upon the two first-mentioned acts of parliament in a case concerning this very canal, reported in 5 *East*, 325. Lord *Ellenborough* there says, "the meaning of the clause of exemption is, that the land or space occupied by the canal should be liable to be taxed as it was before; that is, as the land was before;" and Mr. Justice *Lawrence* observes, that "the meaning of the clause of exemptions clearly is, that the land, *qud* land, shall not be exempted, but that the tolls shall." We have, therefore, no doubt whatever that the land must be rated *somehow*, and that the only question is *how*. And upon this point several different modes of valuation are suggested, as to which, it might be sufficient to say which, in our opinion, ought to be adopted. We will observe, however, that the calculation of value, "as agricultural land," seems to be wholly unauthorized by any thing to be found in any of the acts of parliament. We reject also all calculations founded upon a supposition that the land is applied for the purposes of a canal; because as there must be some value to make it rateable at all, its value upon that supposition must be the profits of a canal, or, in other words, the tolls, which, as we have seen, are expressly exempted, except in the event of a rate being imposed on personal property. The only remaining criterion suggested, is to take its value "according to the value of similar adjacent property in the parish of Liverpool." And we think this is the true principle, and that by reference to and comparison with what is immediately adjoining, a reasonable estimate of the actual value of the land may be obtained. And, moreover, (as has been before observed) this mode of valuation actually has been adopted in that part of the rate which is admitted.

But is this to be the value, at the time of passing the acts, of making the canal, or of making the rate? Our recent decision in the case of *The King* v. *Monmouthshire Canal Company* (*b*), answers the question, and nothing but the pressure of the most cogent reasons, or the most unambiguous language of the acts of parliament, could incline us to impose so unreasonable and impracticable a duty upon parish officers as to find the value of property sixty or

(*a*) 1 B. & A. 263. (*b*) 3 A. & E. 619; 1 Har. & Wol. 464.

seventy years ago. It has not escaped us, that in the statement of this case it is said that the value of agricultural land in the neighbourhood in question, at the time of passing the 10 *Geo.* 3, was 30*s.* an acre. How this conclusion was arrived at we know not, but that it must have been in a great degree precarious conjecture, there is every reason to believe. The question, however, for our decision is, what is the proper construction to be put upon the acts of parliament as to this point; and if that had depended upon the first act, (10 *Geo* 3, c. cxiv.) it seems impossible to raise a doubt. The exempting clause in that act, it will have been observed, is in these words, that the rates, tolls and duties shall be exempted from the payment of all rates, &c. other than such rates, &c. as the land used for the purposes of the navigation would have been subject to if that act had not been made. Then to what would the land have been subject? Assuredly not to the rate which at that time might chance to be imposed, but to any rate which from time to time might be imposed, from a change of circumstances and of value. The 23 *Geo.* 3, c. xlvii. does indeed repeal the above provision, but the exempting clause (section 31) has the same precise words as those just quoted, with this addition, " and that such navigations, cuts or canals, shall not be subject to the payment of any taxes, rates or assessments, (save and except such as have been and now are usually charged and assessed thereon,") now we are not prepared to say that these words fix and define the rate to which the land is for ever to be subject, in the manner contended for by the counsel for the appellants. The question recurs, to what rate had the land been and then was *usually* charged? Certainly not to a rate according to any fixed and never-varying standard, but to a rate variable according to circumstances in the manner before alluded to, and which it is unnecessary to repeat. But we are not driven to arrive at a conclusion upon this state of the question: it is important to attend to the provisions of the last act upon the subject, the 59 *Geo.* 3, c. cv. That in its title is declared to be an act for the purpose of " amending the several Acts relating to the said Leeds and Liverpool Canal," and incorporates the provisions of former acts, " except such as are repealed or altered by it." If then, according to the argument, the true construction of the 23 *Geo.* 3, c. xlvii. be that the land should continue thereafter to be assessed in the same sum as in the then existing rate, it is certain that this provision has been repealed or altered by the 59 *Geo.* 3, c. cv. Upon the language of this (the last) act it is impossible to raise a doubt, as we have before said, we think it to be upon the language of the first. By the 17th section, " the lands, houses, wharfs, quays, and other property of the Company shall be rateable in the several parishes &c. where they are respectively situate; the lands according to the quantity and quality, and the houses, wharfs, quays and other property according to the nature and respective uses, dimensions and descriptions thereof, and shall be assessed in like manner as lands of a like quality, and as houses &c. of a like size, nature, dimension or description in the respective parishes or places where the same shall be situate, are or shall be assessed or charged." Now this we consider to be conclusive. And, even supposing the last cited section not to have " repealed or altered" the provisions of 23 *Geo.* 3, c. xlvii. yet it is an undoubted and acknowledged rule of construction, that statutes *in pari materiâ* are to be taken together; and even in this view, a strong inference arises that the successive rates and not

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any particular rate were in the contemplation of the legislature. It may also be observed, before we quit this part of the subject, that the comparative method of valuation, in favour of which we have already pronounced an opinion, is here expressly recognized and adopted. We think, therefore, that the assessment upon the appellants, in respect of this part of the property, is rightly taken at the amount of £1806 : 3*s.* 6*d.* the value of the land occupied by the Company in canal, basins and a towing-path, according to the general value of the land immediately adjoining them.

The next question arises upon the basin and three branches, of which the appellants are the occupiers, the same not being part of the original line or trunk of the canal, but communicating therewith in the parish of Liverpool. To these branches, it is stated that there are adjacent quays and wharfs on each side belonging to the Company. And, in the first place, we think that these branches must be considered as part of the whole navigation. Indeed we are not aware that the contrary was contended; but it was said that this portion of the navigation having been once rated in the shape of land, is again *virtually* rated in the increased value which it confers upon the adjacent wharfs and quays, which are assessed accordingly. That these wharfs and quays are increased in value, and will let for more to tenants, or will be more profitable to the Company if retained in their own occupation, cannot be disputed. The case indeed states it, but the thing is obvious—situation is of course a material ingredient in the aggregate value of this property. That the use of these branches and basin also directly contributes to increase the value is, as we have already observed, beyond dispute; but we are unable to assign any precise or practical result to this fact, or to arrive at the conclusion attempted to be deduced from it, that the rate, therefore, cannot be sustained. That this part of the navigation is rateable as land, we have already seen, and the wharfs and quays are equally so by express enactment. The amount, therefore, alone is in question, and when in this case various concurrent causes contribute to the general prosperity, and by consequence to the value of property in the place, we think it impossible for human ingenuity to reduce to a calculation, in sums certain, how much should be set down to one cause and how much to another. They are inseparable, and cannot be analysed. The value of the property must be taken *as it is*, from whatever causes arising. Suppose, in the present instance, the tolls had not been exempted, and that they had been rated, as they certainly might, in the shape of profits, by connecting them with some real property of the Company situate in the parish, and it could have been clearly shown that a great advance in the value of all property had taken place by reason of this "navigation;" would it have been any answer to such a rate as we have supposed, that the canal Company had been already assessed by reason of the general increase of the rates throughout Liverpool from the cause above mentioned? It is observable also, that in that part of the rate which is admitted to be correct, a value is set upon property so immediately and intimately connected with the navigation, that the value without it must, we presume, be reduced comparatively to nothing. We must here remark that this precise argument and the difficulty, whatever it may be, were pressed upon us in the very same shape in the case of *Rex* v. *Monmouthshire Canal Company*, and that they then received from the different members of the Court substantially the same answer as has now been given.

We think it right to add, that having had occasion necessarily to reconsider the ground of our decision in that case, we see no reason to doubt its propriety, or to depart from it. Upon the three branches and basins, therefore, we think the assessment ought to be in the sum (mentioned in the case) of £685 : 9*s.* being their amount in value as mere land at the time of rating, without regard to the use to which they are applied.

Our former observations have anticipated all that is needful to say upon the subject of the wharfs or quays, the last species of property described in the case. We have already said that they are expressly made rateable, and that in our opinion the comparative method of valuation is the true one; that is, "according to the value of similar property in Liverpool," in the language of the case; or (in the words of the 17th section of the *59 Geo.* 3, c. cv.) "the lands, dwelling-houses, wharfs, quays, warehouses, lockhouses and other houses of the Company shall be rateable; the lands according to quantity and quality, and the dwelling-houses, wharfs, quays, warehouses, lockhouses and other houses, according to the nature and respective uses, dimensions and descriptions thereof, and shall be charged and assessed in like manner as lands of a like quality, and as dwelling-houses, warehouses, lockhouses and other houses of a like size and nature, dimension or description, in the respective parishes, townships or places *where the same shall be situate*, are or shall be assessed or charged." The words "wharfs and quays" are omitted in the last member of the sentence, but they are expressly made rateable in the former part; and it is impossible to suppose that a different method of valuation was intended for them from that which is so minutely prescribed for the other property. Indeed, if no method of rating them were prescribed by the act, the value of similar property in Liverpool would furnish the best criterion of theirs on this principle.

In respect of these wharfs and quays, therefore, there must be an addition to the assessment of £694 : 18*s.* 6*d.*

It remains briefly to notice an observation of the counsel for the appellants before alluded to, which was intended to go the length of shewing that the space occupied by the navigation and all its parts should be exempt from assessment altogether. It was said that the word "land" in these acts of parliament could not mean land covered with water; for that, wherever that was designated, the words "navigation, canals, cuts," &c. are used.

As to which it is to be observed, first, that it was not shown to what other property of the Company the word "land" (accompanied with and distinguished from every other description of their property) was applicable, except to land used for their navigation. Next, this interpretation is directly opposed to that of the learned judges, whose language we have already quoted from the report in *5 East*, 325. But, lastly, there is no such contradiction between "land" and "navigation, cuts and canals," as was assumed, but directly the reverse. In section 31, of the *23 Geo.* 3, upon which we have before commented, the tolls are declared to be exempt from any rates, "except such as *the land* which hath or shall be *used for the purpose of such navigation, cuts or canals*, were or would have been subject to if this act had not been made, and that such *navigation, cuts or canals* shall not be liable to the payment of any rates except such as have been and now are usually charged thereon. Except, therefore, the "land used for navigation, cuts or

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canals," and the words "navigation, cuts, or canals," mean the same thing, the latter part of the sentence has no meaning at all.

The result, therefore, is, that in our opinion the Company is liable to the extent of the assessment, and that the order of sessions, confirming the rate, should be confirmed.

Order of Sessions confirmed.

ALSTON, Clerk, *v.* ATLAY.

After an incumbent of a benefice under the value of 8*l.* in the king's books, has been instituted and inducted to another benefice with cure of souls, the right of presentation accrues thereby to the patron, and is not assignable by law to another, and the incumbent not having been deprived and no new clerk having been presented, remains still the incumbent, and is legally entitled to the tithes.

Upon institution to the second living the first is void *as to the patron*, but not so as to incur lapse without sentence of deprivation and notice by the ordinary, or at least until notice by the ordinary.

The right to the fallen presentation having become a personal inalienable right in the patron disannexed from the advowson, the want of knowledge of the vacancy by the patron does not alter the quality of the right so as to make it real, or re-annex it to the advowson.

ERROR upon a judgment of the Court of K. B., in an action of debt under 2 & 3 *Edw.* 6, c. 13, by the plaintiff in error, as rector of Cowsby in the county of York, against the defendant, for the treble value of tithes not set out by the defendant. Plea (before the new rules), nil debet. At the trial before *Parke*, B., at the Yorkshire Spring Assizes, 1835, a verdict was found for the plaintiff, subject to the opinion of the Court on a special case, which afterwards, by consent of the Court, was turned into a special verdict, the facts of which were that

In 1816, the plaintiff was instituted and inducted to the rectory of Cowsby, a benefice under the value of 8*l.* in the king's books, and duly read and subscribed the articles.

1829. The plaintiff, on the presentation of his brother, was instituted and inducted to the rectory of Odell, in the county of Bedford, a benefice above the value of 8*l.* in the king's books, and distant 100 miles from Cowsby, and duly read and subscribed the articles.

1831. *Justinian Alston*, the brother of the plaintiff, owner of the manor and patron of the rectory of Cowsby, sold and conveyed the manor and advowson to *George Lloyd*.

1832. *George Lloyd*, considering the rectory of Cowsby had become voidable in consequence of the acceptance by the plaintiff of the rectory of Odell, presented the Rev. *George Wray* to such rectory, in pursuance whereof he was instituted and inducted and read and subscribed the articles.

1833. The defendant, a farmer in Cowsby, who up to Michaelmas, 1832, had regularly paid his tithes to the plaintiff as rector, had ceased to pay them, (they being claimed by the Rev. *George Wray*,) and did not after due notice set them out in kind. The common errors were assigned. Joinder in error. The case was argued 11th May, 1837, before *Tindal*, C. J., *Parke*, B., *Bosanquet*, J., *Bolland*, B., *Gurney*, B., and *Coltman*, J. (*a*)

Wightman, for the plaintiff in error.

Tomlinson, contrà, was stopped by the Court before the conclusion of his argument.

Wightman, in reply.

TINDAL, C. J., in Trinity vacation, after stating the pleadings and special verdict, thus delivered the judgment of the Court:—It is to be

(*a*) See the report of the arguments and judgments in K. B. 2 Har. & Wol. 166, where the special verdict is set out at length.

observed, that this special verdict does not find that the plaintiff was presented to the living of Cowsby by his brother *Justinian;* nor that he was presented to that of Odell by the same brother; nor that the patron had knowledge of the institution or induction of the plaintiff to the second living at the time he conveyed the advowson to Mr. *Lloyd.* The questions therefore which arise on this record are two; first, whether, after an incumbent of a benefice under value has accepted, and been instituted and inducted to another benefice with cure of souls, the right of presentation which accrues thereby to the patron be assignable by law to another? and, secondly, whether the want of knowledge on the part of the patron, of the fact of cession at the time of such transfer, causes any difference? That the *advowson* itself was assignable there is no doubt; but if the right of presentation was not under these circumstances assignable, then it follows that Mr. *Lloyd* had no right to present his clerk, and that the plaintiff in error, not having been deprived, and no new clerk having been presented, is still the incumbent, and still legally entitled to the tithes; 2 *Roll. Abr.* 361, pl. 6; *Watson's* Complete Incumbent, 8; *Comyn's* Digest, Esglise, (N 5); and the concluding part of the judgment in *Halton* v. *Cove* (*a*). And upon a careful consideration of the authorities, we are compelled to come to the conclusion that the judgment of the Court of King's Bench is erroneous. There is no question but that if a benefice be actually void by the death of an incumbent, by his resignation or by cession under 21 *Hen.* 8, c. 13, or by deprivation (Cro. Eliz. 811,) the right to present upon that avoidance is not capable of being transferred, either alone or with the entire advowson; it is a personal right, or interest severed from the advowson, and vested in the person of him who was patron at the time—a chose in action which is not assignable, and which is designated in the books by a great variety of names, all indicating its personal and unalienable quality. (See those collected in *Mirehouse* v. *Rennell* (*b*).)

The question then is, whether the right to present, caused by the cession in this case, was a chattel disannexed from the advowson, and vested in the person of Mr. *Justinian Alston* before the transfer to Mr. *Lloyd* or not? If it was, it could not be assigned.

There is no doubt but that this right of presentation accrued by the canon law, namely, by the fourth Council of Lateran; but it is equally clear that this canon has been recognized in this country, and has become a part of the common law of the land. *Holland's* case (*c*), *Digby's* case (*d*), *Evans* v. *Ascough* (*e*). The point to be decided is, what is the nature of the right given by that canon to the patron? Is it an immediate *right* of presentation in the then patron, when he chooses to exercise it, without doing any thing previously to avoid the interest of the then incumbent, or is it only a right to avoid that interest by some act and then to present—or to avoid it by the act of presentation only *per se*, such interest of the incumbent being valid, and the church full as to the patron in the meantime? If the former be the true answer, then we conceive such right is like every other vested and complete right of presentation—a personal thing, and incapable of transfer. If the

(*a*) 1 B. & Ad. 559.
(*b*) 8 Bing. 490—518.
(*c*) 4 Rep. 75 a.
(*d*) 4 Rep. 78 b.
(*e*) Latch. 243.

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latter, then it is probable that the right would pass with the advowson to the new patron.

Now although the books use some variety of expression on this subject, in some cases, the benefice being said to be "void," in others "void as to the patron for his benefit"—in some "to be void at his election"—and in others, but of a comparatively recent date, "to be voidable"—yet in none is it intimated that the patron has not an immediate right to present as to a void church, *without doing any further act* in order to make such presentation valid. And the substance of the authorities is, that he has a complete right to present upon the cession, by institution to the second benefice, but does not lose his right by lapse till sentence of deprivation and notice by the bishop, from which time the six months begin to run.

It may be advisable to make a short review of these authorities. The fourth Council of Lateran is to this effect—"Quicunque receperit aliquod beneficium curam habens animarum annexam, si prius tale beneficium habebat *eo sit ipso jure privatus;* et si forte illud retinere contenderit, etiam alio spolietur. *Is quoque ad quem prioris spectat donatio, illud post receptionem alterius libere conferat cui merito viderit conferendum.*" (*a*)

The fair construction of the words of this canon is, that upon acceptance of the second benefice, the clerk should be deprived of the first by the *law itself*, "*jure ipso*," without any actual sentence of deprivation, and the patron may then freely present a clerk without any other act to be done, as on a deprivation. The constitution itself (it will be seen afterwards) operates in the nature of a general sentence of deprivation. And that this is the true construction of the canon is confirmed by many authorities. One of the earliest cases on this subject is *Holland*'s case (*b*), in which the Court held "the benefice to be void, not by the common law, but by the constitution of the Pope, of which avoidance the patron might take notice, if he would, *and might present, if he would*, without any deprivation; but because the avoidance accrued by the ecclesiastical law, no lapse incurred without notice, as upon deprivation or resignation, and yet the patron might present and take upon him notice, if he would; so that for the benefit of the patron *the church is void*, but not for his disadvantage."

In the report of the same case in *Moore*, 542, the first benefice is said "to be *void* by the common law, without sentence declaratory, at the *election* of the patron;" which really means the same thing, and is so explained by the context, that he may, if he will, present without notice. There is no intimation in this or any other case that any act of the patron is necessary to avoid the benefice before presentation.

In the report in Cro. Eliz. 601, the first benefice is said to be "void" by order of the common law.

In *Digby*'s case (*c*), *Popham*, C. J., and the whole Court state that, "although by the institution to the second benefice, the first is void by the ecclesiastical law without any deprivation or sentence declaratory; yet no lapse shall incur *unless notice be given to the patron*, no more than if the church became void by resignation or deprivation, and yet the patron may take notice, if he will, and present according to the said constitution."

In *Rex* v. *Archbishop of Canterbury* (*d*) the church is said to be "void, but

(*a*) Gibs. Cod. 904, n.
(*b*) 4 Rep. 75 a.
(*c*) 4 Rep. 79 a.
(*d*) Hetley, 125.

not so that the lapse incurred." So in *Fitzherbert's* N. B. 34, L, the first benefice is said to be "void." In *Edes* v. *Bishop of Oxford* (*a*) it is also said to be "void." In *Winshcombe* v. *Bishop of Winchester* (*b*) it is said "a thing may be void or not void, at the election of him whom it concerns, as in *Holland*'s case (*c*). The patron of the church may take it as void, and present presently, or may leave it as full till sentence of deprivation." It is remarkable that there the church is not said to be full. In the case in Sir *William Jones*'s Rep. 334, (reported also in Cro. Car. 354,) *Rex* v. *Priest*, the law is laid down to the like effect as in *Holland*'s and *Digby*'s cases, and a very clear explanation given of the Council of Lateran. It is said to have been "held first by the greater part of the justices, that before the statute of 21 *Hen.* 8, the first church was *void*, and the patron could present if he would, without sentence declaratory by the said constitution of Lateran; for the words are "ipso jure sit privatus," and do not mention any sentence of deprivation. By the same canon a church shall be void without sentence if one be consecrated bishop. So, for the same reason, by the same words, the first benefice shall be void by the taking of the second benefice. If a party resigns, or be deprived by a particular sentence for crime, the church shall be void; and *a multo fortiori*, the constitution (which is a general sentence of deprivation, as is said in 10 *Edw.* 3, 2,) will make an avoidance; but, true it is, in the said case the patron is not bound to take notice of it being an ecclesiastical constitution. So upon a particular deprivation or resignation, notice ought to be given to the patron, otherwise no lapse; yet there *is an avoidance*." And it was agreed on the other part, according to the said cases, that the patron can present, if he will, without notice or sentence declaratory; and that could not be, unless the church was *void* before the presentation, for the form of presentation is "ad ecclesiam jam vacantem," which presupposes vacancy before the presentation.

In *Le Roy* v. *L'Evesque de Londres* and *Baldock* (*d*), it was resolved by all the four judges, that where the first living was under value, the acceptance of a second was an avoidance by the common law *ipso jure*, without any deprivation, so that the patron could present, if he wished, without any sentence of deprivation; and the church being once void as to the patron to present, a dispensation by the archbishop afterwards came too late, and could not restore the clerk to his benefice." And *Jones* says, "it seemed to him clearly, that by the institution and induction to the second benefice, the first being under value, the first benefice was *void* as well as if it was above value; but the difference in the last case is, that the patron must take notice at his peril, for it is void by the act of parliament; and the words are, "it shall be void as if the incumbent were dead;" and if he does not present within six months, the living will lapse. But in the first case there was no lapse, and the patron might present." And he also gave his opinion "that if the bishop gave notice to the patron of the taking of the second benefice, if he does not present within six months there would be a lapse as upon deprivation or resignation; and if the benefice was not void, but there ought to be a deprivation, then the presentment and institution upon that would be a void institution, which is not so, for the first institution and incumbency is made void by taking the second benefice." And the case of *Leak* v. *Bishop*

(*a*) Vaughan, 18. (*b*) Hobart, 165. (*c*) 4 Rep. 75 a. (*d*) Sir Wm. Jones, 404.

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of Coventry and another (*a*) has a very important bearing upon the question now under discussion; for it is a direct authority that where the bishop, after deprivation, but without giving notice of such deprivation, collated, and the patron afterwards grants the advowson in fee, and the clerk collated by the bishop dies, the *grantee* of the advowson cannot bring *quare impedit;* and the reason given is, "that when the original patron had right to present upon the deprivation as in his turn, although the collation by the bishop, without notice, was not good, nor ousted him, but that he always might have presented and ousted the incumbent by his bringing of a *quare impedit*; yet it is but a thing in action, and when he hath granted the advowson over, the grantee cannot have this thing in action."

It is only in more modern times, we believe, that the benefice is said to be "voidable." In *Gibson's Codex*, 906, in a note, it is said to be "voidable;" but that word is used as an explanation of the former part of the note. In the very modern cases of *Betham* v. *Gregg* (*b*), *Apperley* v. *Bishop of Hereford* (*c*), the word "voidable," is coupled with the words "perhaps actually void." We do not, however, understand that, by the use of this word "voidable," it is intended that any previous step is necessary before the patron presents, for there is no authority whatever for such a position. It means merely, that if the patron does not elect to present, the incumbent may hold the living; it does not mean that the living is full as against the patron in the meantime.

It cannot well be that the living is full as relates to the patron, and that the presentation itself determines the interest of the clerk; because it is clear that the presentation must be *when* the church is already *void*, and proceeds upon that assumption. An authority for this position has been before cited; and Lord *Coke* in 1 Roll. Rep. 213, citing *Smale's* case, 17 *Edw.* 3, 59, distinctly says the church ought to be void before he can present; for if the church be voidable no presentation can be made. *Rud* v. *Bishop of Lincoln* (*d*) is another authority that the right to present implies that the church is then *void*.

The result of these authorities is, that upon institution to the second living the first is void *as to the patron*, but not so as to incur a lapse without sentence of deprivation and notice by the ordinary, or at least until notice by the ordinary; and if void as to him, he cannot deal with the fallen right of presentation at all; it is a personal inalienable right.

The second question, whether the want of a notice makes any difference, is readily disposed of. If the right to a fallen presentation *be* a personal right disannexed from the advowson, it is clear that want of knowledge of the vacancy by the patron cannot alter the quality of that right; it cannot make a *personal* thing *real;* it will not re-annex it to the advowson, any more than want of notice of rent being in arrear—(which bears the closest analogy to the subject-matter under consideration)—would enable the vendor of a reversion to transfer the rent in arrear with the reversion. The only point of view in which it could be important, is with reference to the rights of the grantee of the advowson, as against the grantor, arising out of their contract.

For these reasons we all are of opinion that the judgment of the Court of King's Bench should be reversed.

Judgment reversed.

(*a*) Cro. Eliz. 811. (*b*) 10 Bing. 352. (*c*) 9 Bing. 681. (*d*) Hutton, 66.

SOWELL *v.* CHAMPION, R. T. TRESIDDER and WHITE.

TRESPASS for breaking and entering the plaintiff's dwelling-house and seizing his goods therein. Plea, by *Champion*, that within the manor of Penryn Forryn, in Cornwall, there now is, and from time &c. hath been, a certain Court of Record holden before the steward of the said Court, for the trying &c. arising within the said manor, to be commenced by plaint in the said Court to be levied; that one *Robert Tresidder* levied a plaint in the said Court against the said *Richard Sowell* (the now plaintiff) for causes of action arising within the jurisdiction, and such proceedings were thereupon had in that Court that *R. Tresidder*, by the judgment of that Court, recovered in such plea against *Sowell*, £11 : 18*s.* 8*d.* for his damages &c., as by the record &c.; that *R. Tresidder*, for obtaining satisfaction of the same, sued out of the said Court, according to the custom thereof, a precept directed to the bailiff of the manor, and the defendant, *Champion*, and two others, commanding them, and every and either of them, that of the goods and chattels of the said *R. Sowell* within the said manor, they or one of them should cause to be levied the damages aforesaid, which the said *R. Tresidder* had recovered, and which precept, before the delivery thereof to *Champion*, was duly indorsed to levy the whole, with incidental charges, &c.; that the precept was delivered to *Champion*, who was the bailiff of the manor and an officer of the said Court, to be executed; by virtue of which precept he so being &c., as such bailiff, afterwards &c. peaceably entered into the said dwelling-house &c., the outer door being open, and *the said dwelling-house being then situate in the said manor, and within the jurisdiction of the said Court*, in order to seize &c., and did then and there seize &c., and the said goods, the same then and there being in the said dwelling-house, and within the said manor and jurisdiction, for the purpose of levying &c., and in so doing did necessarily &c., as it was lawful &c.; and that *Sowell* afterwards, and before the monies were levied, paid *Champion*, so being such bailiff, the said damages, whereupon he gave up the goods to *Sowell*, who accepted the same. Verification. Pleas by *N. T. Tresidder* and *White*; 1st, not guilty; 2d, similar to that pleaded by *Champion*, but adding to the statement of his entry as bailiff, that *N. T. Tresidder* and *White* entered as his servants and by his command, and stating the goods to have been given up by *Champion* and by them, as his servants and by his command, and with the consent and licence of *Sowell*. Verification.

Replication, that the dwelling-house in which &c. was not situate within the manor and jurisdiction of the Court; and joinder.

At the trial before *Coleridge*, J., at the Cornwall Summer assizes, 1835, the plaintiff proved the entry and seizure of his goods at his house in Penryn, by the defendant *Champion*, bailiff of the Court of the manor of Penryn Forryn, under a writ in the common form, issued out of that Court, indorsed, "take the goods within the manor of Penryn Forryn," and also with the names of the other defendants, who were attornies living at Falmouth. At the time of the levy *Champion* said he was employed by the other de-

An attorney who places a writ for execution in the hands of an officer which the attorney knows that the officer intends to execute in a particular place, afterwards proved to be out of the officer's jurisdiction, is not therefore liable for the act of the officer, unless the attorney, at the time the officer communicates his intention, knew that the place was out of the jurisdiction.

Semble, that if he did know it, his acquiescence in the illegal act of the officer will make him a joint trespasser.

2. The application to a judge in the course of a cause to direct a verdict for one or more of several defendants in trespass, is strictly to his discretion, and that discretion is to be regulated not merely by the fact that at the close of the plaintiff's case no evidence appears to affect them, but by the probabilities whether any such will arise before the whole evidence in the cause closes.

3. Where the goods of a party have been seized under lawful process against him improperly executed upon him, and he pays a sum of money to release his goods, he is entitled to recover, in an action of trespass, damages to the full amount of the money paid, and the measure of damages is not limited by the injury actually sustained.

4. Where the damages are under 20*l.* the Court will not grant a new trial on the ground that the verdict is against evidence, although the decision is one affecting the inhabitants of a large district.

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fendants. It was also proved, that previous to the levy the defendant *Tresidder* had spoken to his brother, the plaintiff in the inferior Court, concerning the execution, and had informed the plaintiff in this action that the levy would not take place on a particular day. There was nothing to show whether or not the plaintiff had any house other than that in which the levy was made. The plaintiff also offered evidence to show that his house was not within the jurisdiction.

At the close of the plaintiff's case, the defendants, *Tresidder* and *White*, contended that they were entitled to a verdict in their favour, on the ground that there was no evidence to show that they had authorized or interfered with the levy. The learned judge, however, declined to direct the jury to find a verdict for them. The defendants then put in the judgment in the inferior Court, and gave evidence to show that the plaintiff's house was within the jurisdiction.

The learned judge left it to the jury to say whether the house in question was within the jurisdiction, and if not, whether *Tresidder* and *White* had directed the levy to be made at that house; and directed them, if they found for the plaintiff, to assess the damages at £18 : 11*s.* 8*d.* the amount paid by the plaintiff to release the goods. Verdict for the plaintiff, damages £18 : 11*s.* 8*d.* His lordship then gave leave to the defendants, *Tresidder* and *White*, to move to enter a verdict for themselves, if the Court should be of opinion that there was no evidence to go to the jury as against them.

Crowder, the next term, moved accordingly, and also for a new trial for *Champion*, on the ground of a misdirection as to the amount of damages, which he contended ought only to be estimated by the injury done to the plaintiff by the seizure in an improper place, he being clearly liable to pay the amount of the judgment recovered in the inferior Court, and also on the ground that the verdict was against evidence; and though the damages were assessed below £20, yet he submitted that the decision being one which affected a large district, the Court would not, in such case, adhere to the rule restricting them from entertaining such an application.

Per Curiam (*a*).—On the first point there must be a rule nisi. Upon the other two points there will be no rule. The money having been obtained by means of process of law improperly executed, cannot be retained (*b*). The amount of damages therefore was not improperly estimated. As to the last ground, we cannot depart from a general rule, because of the inconvenience which may result from its application to the circumstances of a particular case.

Rule nisi to enter a verdict for *Tresidder* and *White*.
Rule refused for a new trial for *Champion*.

Erle and *Butt*, in Hilary term, (January 21,) shewed cause. *Barker* v. *Braham* (*c*), *Bates* v. *Pilling* (*d*), *Bryant* v. *Clutton* (*e*), decide that an attorney is liable in trespass for a seizure made under process irregularly issued. In

(*a*) Lord *Denman*, C. J., *Patteson*, *Williams* and *Coleridge*, Js.
(*b*) See *Doe* d. *Stevens* v. *Lord*, *ante*, 652.
(*c*) 3 Wils. 368.
(*d*) 6 B. & C. 38.
(*e*) 1 M. & W. 408; and see also *Coldrington* v. *Lloyd*, 1 W. W. & H. 358.

the present case it is true that the process was regularly issued, but it was executed without the jurisdiction. It was necessary therefore to show that the defendants recognized or interfered with the execution of it. As to that there certainly was evidence to go to the jury. The act of *Champion* is also adopted by the special pleas of the defendants.

Crowder and *Barstow*, contrà. The process is admitted to have been regular, and the instructions given by the defendants to *Champion* were to do a lawful act, they are not therefore liable if he has done one which was unlawful, *Stokes* v. *White* (*a*). The statements of *Champion* are not admissible without assuming the point contested, that he acted with cognizance of the defendants. The indorsement of their names on the writ is merely in pursuance of the practice required in the superior Courts.

Cur. adv. vult.

Lord DENMAN, C. J. in the same term, (January 31,) delivered the judgment of the Court.—This case turns upon the question whether the defendant *Champion*, being the bailiff for executing process within an inferior jurisdiction, was directed by the other two defendants, being the attornies who sued out the process, to make a levy in the plaintiff's house, which was proved to be out of the jurisdiction. The rule was granted on a doubt whether there was any evidence of such specific direction. The two defendants pleaded not guilty; and secondly, a justification under the judgment, and fi. fa., averring the plaintiff's house to be within the jurisdiction. The plaintiff contented himself at first with proving the goods seized, and that they were taken by the defendant *Champion* under a precept handed to him by the defendants *Tresidder* and *White*. At the close of this case, the counsel for *Tresidder* and *White* applied to the learned judge to direct their acquittal, which, we think, he properly refused. The ground for the application was the alleged absence of any evidence against them to make them co-trespassers; but this ground, if true in fact, would by itself have been wholly insufficient to warrant it. The application to a judge in the course of a cause to direct a verdict for one or more of several defendants in trespass, is strictly to his discretion; and that discretion is to be regulated not merely by the fact that at the close of the plaintiff's case no evidence appears to affect them, but by the probabilities whether any such will arise before the whole evidence in the cause closes. There is so palpable a failure of justice when the evidence for the defence discloses a case against a defendant already prematurely acquitted, that such acquittal ought never to take place but where there is the strongest reason to believe that such a consequence cannot follow.

In the present case we think that if in truth there had been nothing for the jury to consider as against these two defendants, the judge would have exercised a sound discretion in refusing to direct their acquittal when the application was made; but we are of opinion, that until the judgment was put in, and they appeared to be acting as attornies in the execution of a judgment, they could be considered only as directing a seizure of the plaintiff's goods without any authority; and although the direction was in terms to seize within one jurisdiction, and the seizure was in fact made in another, yet it

(*a*) 1 C. M. & R. 223.

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was open for the jury, as against wrong-doers, to consider upon the whether they did not direct the seizure to be made in that place they certainly knew that it would take place. The defendants tempted to establish their justification, but failed; they proved, ho judgment against the plaintiff, and an execution regular in all respects that the plaintiff's house was not within the jurisdiction. In the c this evidence, however, it clearly appeared that the two attornies ha handed the precept to the bailiff to be executed, and it was now co that they were not liable to an action of trespass if he acted bey bounds of his franchise, which it was his duty to know, and not their plaintiff, not disputing this general proposition, contended that the had in effect taken upon themselves to order the bailiff to enter the p house. The circumstances relied upon to prove this proposition w all these persons living near together and being acquainted, and the having notoriously no other house than this, and no goods but what this, the bailiff must have understood the attornies, when he recei precept from them, to intend that he should make the seizure in that i house; and further, that one of the attornies sent a message to the to inform him that *Champion* was about to be absent a short time, an not levy on that day. The special pleas, pleaded by all the defendan also strongly urged, as showing that they all avowed and justified the levying at the plaintiff's house; *Tresidder* and *White* thus adopting of *Champion*, as indeed they might fearlessly do, if they believed the plea, that the house was within the jurisdiction. Upon consideratio grounds appear to us all insufficient. 1st. The attorney who places for execution in the hands of an officer does a lawful act, though he fully persuaded that the officer will be likely to execute it in some pa place, which may turn out, upon inquiry, to be out of his jurisdiction attorney's opinion upon such a point is immaterial, unless he indu officer to act upon it; he is not bound to form any; the officer must peril, act where he has the power. We think that the circumstances case go no further than to show that when the attorney gave the pre thought it would be executed at the plaintiff's house, without direc authorizing it. 2dly. If it could be pressed even to the extent of in that the attorney knew the bailiff intended to do so, we cannot say any evidence of his giving such authority. The bailiff may have told intention, and the attorney may have either thought him right, or not t about the matter. That the bailiff's intention originated with some word of the attorney, is not at all evidenced by the knowledge now sup If indeed the bailiff had communicated his intention with respect to a that the attorney knew to be out of the jurisdiction, his acquiescence act which he must have known to be illegal, might possibly have mad a joint trespasser. But every thing here makes it impossible to dou attorney's *bonâ fide* belief that the house was within the jurisdiction. Furthermore, the plaintiff argues the co-operation of all the defendants unlawful entry of the plaintiff's house, from the special pleas. He co that if the attorney gave no special direction to the bailiff he woul rested on the general issue, and not have defended himself by asserti lawfulness of the act as done within the jurisdiction. The introductio special plea on the record, however, can furnish no evidence in answer

general issue. A defendant, by adducing evidence on a second plea, may strengthen against himself a case already made on the first, but he makes no such case by the mere averments or admissions in such plea. Upon the whole, therefore, we think, that at the close of the case, as the two defendants, *Tresidder* and *White*, would have been entitled, if sued without *Champion*, to a nonsuit, they were entitled to a positive direction from the judge to the jury that they ought to find a verdict in their favour, and that he was mistaken in leaving it at all as an open question for their consideration. It follows that as these defendants are to have the same benefit now, as if the judge had given that strong direction, and a verdict had passed in their favour, a verdict of not guilty ought now to be entered for them.

Rule absolute.

The QUEEN *v.* The Councillors of the Borough of DERBY.

Nov. 22.

A party having a majority of votes for the office of councillor of a borough, and having been declared elected according to the form prescribed by s. 35 of the Municipal Act, and having also been admitted, the office is full *in fact*, and the remedy to try whether it be full *of right* is *by quo warranto*.

The party next on the poll having obtained a rule nisi *for a mandamus* to two of the councillors, to administer the declaration to him, on the ground that the party declared to be elected was ineligible, the Court therefore discharged the rule with costs.

WHITEHURST, in Michaelmas term, 1836, had obtained a rule nisi for a mandamus to the councillors of the borough of Derby, or any two of them, to administer to *John Flewker* the declaration required by 5 & 6 *Will.* 4, c. 76, s. 50, to be taken by persons elected to the office of councillor of a borough, upon the following state of facts:

The borough was divided, under the Municipal Act, into six wards; to each ward was allotted six councillors; two of those wards are intituled Castle Ward and Becket Ward.

26th December, 1835, the first election under the Municipal Act, six persons were duly elected, and subscribed the declaration as councillors for Castle Ward. Of these, *Harwood* and *Johnson* were the two who had the lowest number of votes.

31st December, 1835, two of the other four councillors for Castle Ward were elected aldermen; and

9th January, 1836, *Tunnicliffe* and *Lowe* were elected to fill up the vacancies thereby created among the councillors for Castle Ward, by a number of votes lower than that by which *Harwood* and *Johnson* had been elected.

1st November, 1836, *Tunnicliffe* and *Lowe* ceased to act as councillors for Castle Ward, and *Tunnicliffe* the same day became a candidate for the office of councillor for Becket Ward. Among the candidates, one *Gadsby* had the highest number of votes, *Tunnicliffe* stood next, and *Flewker* third on the poll. *Gadsby* and *Tunnicliffe* were declared duly elected, and were admitted councillors. *Flewker* tendered himself at the Guildhall, and also at the first meeting of the council, to make the declaration as councillor for Becket Ward, but was rejected.

The rule nisi had been obtained on the ground, 1st, that *Tunnicliffe* and *Lowe* had been elected to supply an extraordinary vacancy in Castle Ward, and therefore, under sect. 47, they ought to have continued in office as long as the two councillors whose places they supplied would have continued, and therefore that on 1st November, 1836, not they, but *Harwood* and *Johnson*, ought to have gone out of office; 2dly, that assuming *Tunnicliffe* to be ineligible for Becket Ward, that fact was notorious to the burgesses (as to

Whitehurst, contrà, as to the 2d point, cited *Rex* v. *Hawkins* *Blissett* (*c*). He also contended, that the administering the declar merely a ministerial act, the consequence of which would be only applicant in a situation to try his right, a mandamus might well g cited *Carpenter*'s case (*d*), *Rex* v. *Archdeacon of Middlesex* (*e*).

Cur. a

Lord DENMAN, C. J. now delivered the judgment of the Court.- a rule nisi for a mandamus to two of the councillors of the borough to administer to Mr. *Flewker*, claiming to have been elected a co that borough, the declaration prescribed by the 50th section of 5 & c. 76. The case appeared to involve several questions certain siderable difficulty in the construction of that act of parliament, w to the time and manner of supplying extraordinary vacancies in th councillor; but it is not necessary to come to any decision upon tl tions, inasmuch as the Court is of opinion, that whatever view b them, this rule cannot be made absolute. The motion was made ground of a supposed ineligibility in one of the other candidates, *nicliffe*, who had more votes than Mr. *Flewker*, and was declared e cording to the form prescribed by the 35th section of the act, and admitted a councillor; the office, therefore, is full in fact, and the try whether it be full of right is by quo warranto. The case is no of a disputed election of churchwardens, respecting whose offic quo warranto will not lie, and there is no necessity to administer ration in order to enable Mr. *Flewker* to try the validity of Mr. *T* election. It will be time enough hereafter to consider whether su damus as is now prayed for can be granted, if Mr. *Flewker* shoul by a proper course of proceeding, in ousting Mr. *Tunnicliffe*, a afterwards meet with any opposition in making the declaration, admitted into the office which he claims.

Rule discharged. wit

The QUEEN *v.* JONES (*a*).

QUO WARRANTO. In 1836 the defendant had been elected assessor to the borough of Carnarvon, under 5 & 6 *Will.* 4, c. 76, s. 43 (the Municipal Corporation Act).

In Michaelmas term, 1836, and previous to the passing of 7 *Will.* 4 and 1 *Vict.* c. 78, a rule nisi for a quo warranto had been obtained against him on various grounds, some of which are not material.

The objection relied on was, that the election had taken place before a person as mayor, who was not entitled to that office.

In Hilary term 1837, the rule was discharged, but afterwards, on motion, reopened, and permission given to the defendant to file further affidavits, provided such affidavits were filed before a certain day. Affidavits were so filed, which went to shew that various parties, among others the attorney to the relator, had been parties to an arrangement for the election of the defendant, with a view to preserve the peace of the borough. These affidavits, upon exception taken to them, were excluded.

Sir *W. W. Follett* and *R. V. Richards* now shewed cause. It may be admitted that this election cannot be supported on the merits. But 7 *Will.* 4 and 1 *Vict.* 78, does away with the necessity to enquire into them. No doubt that statute, like many other modern ones, requires judicial interpretation to make it throughout intelligible. But the enactment, s. 1, is absolute that all elections made since 25th December, 1835, shall be good notwithstanding any defect in the title of the person presiding at the election. And s. 20 provides, that proceedings commenced on such ground before the passing of the act, and still pending, shall be *discontinued immediately upon the passing of the act, on payment of the costs incurred* up to that time, and that the relator shall be entitled to receive from the defendant in every such proceeding all such costs, &c. The title of the defendant is therefore made good, and no judgment of ouster could be given. The discontinuance being imperative, it is difficult to understand what authority the relator has to proceed. It will be said that the discontinuance is conditional, on payment of costs; however that may be, it is clear that the present rule must be discharged. The Court cannot put on the file a rule to oust a party whose title is declared by the legislature to be valid. Because it is observable, that s. 1 does not contain any exception as to the title of those parties against whom proceedings have been commenced. In other statutes, as in the 2 *Geo.* 3, c. 54, s. 10,—5 & 6 *Will.* 4, c. 2, s. 1, where analogous enactments are found, a special provision is made as to those acts respecting which question has already been made; here the enactment is absolute. If the construction contended for on the other side be correct, its application must be universal. But it cannot be meant that parties whose title might be valid on the merits must necessarily tender costs to the relator, in order to effect a discontinuance which is no benefit to them. At all events the utmost that can be said is, that it is open for either party to apply to the Court

7 *Will.* 4 and 1 *Vict.* c. 78, s. 1, removes the defects in elections to municipal offices, under certain circumstances. S. 20 provides that proceedings begun before that act against parties so elected, shall be discontinued on the payment of costs to the relator, incurred up to that time.

A rule nisi for a quo warranto having been obtained previous to the passing of that act, and no costs having been tendered to the relator, the Court *held* the discontinuance conditional on the payment of costs, and made the rule absolute.

Where one, with a view to preserve peace, has been party to an arrangement for the election of another to a municipal office, the Court will not allow him, as *relator*, afterwards to question that election on quo warranto.

Quære whether he will be permitted, as a mere deponent, to make affidavit in support of such application.

(*a*) Two other cases, *Reg.* v. *Owen* and *Reg.* v. *Potter*, from the same borough, and involving the same point, received the same decision; 3 T. R. 300.

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for a discontinuance, and in case that is not done by the defendant, for the relator to apply for a rule calling on the defendant to shew cause why he should not pay the costs to the relator.

Sir *J. Campbell*, A. G. and *Jervis*, contrà, were stopped by the Court.

Lord DENMAN, C. J.—This was of itself a very complicated case, because of the several questions which it involved. The consideration of it was postponed in the anticipation that the act referred to would have removed some of its difficulties. But the act, instead of removing those already existing, has created others.

The first question relates to the reception of certain affidavits. It has been argued, and I think correctly, that though the provision as to the time of their being filed, created a necessity for them to be filed before that time, still it did not relieve them from any objections which might be taken to their reception, even although filed before that time. An objection accordingly, which we consider a valid one, has been taken to their reception. Still I do not hesitate to declare my opinion, that, had it been plainly shewn to the Court that a person had been party to any arrangement for the sake of peace, such individual could not afterwards have been allowed to come forward as a relator, and I much doubt if he could as a deponent, to get rid of that arrangement (*a*).

The other and more important question is, whether these proceedings can be continued, or were absolutely put a stop to by the act of parliament. That act says, that elections such as the present, shall be held good, subject to the provisions in s. 20, which provides for the discontinuance, I think conditionally only, of proceedings relating to them. It is true the act does not contain the exceptions found in other acts, and the words relating to the discontinuance, taken literally, are absolute. Still I think that upon a fair construction, we must infer a condition to be implied. The act provides for the discontinuance upon payment of costs. Upon costs being tendered, therefore, it is open to the prosecutor to say, "I accept them, and I stay proceedings." Still, on the other hand, it is also open to the defendant to say, "I do not chuse to pay costs; my title is a good one, and I elect to have the proceedings go on." Therefore it is possible for a case to occur, in which the proceedings certainly ought to go on, although, perhaps, no ouster could follow upon the rule being made absolute. The defendant's title is admitted to be defective, and I think, as far as regards the discontinuance of these proceedings, that defect could not be cured but on a condition to which the parties have not resorted. The rule, therefore, must be made absolute.

PATTESON, J.—I am of the same opinion. The act says, that the proceedings shall be discontinued on the payment of costs. Here no costs have been paid or tendered; therefore the provision of the act, which is only conditional, does not come into operation.

WILLIAMS, J. concurred.

COLERIDGE, J.—As to the question on the statute, Sir *W. W. Follett* argues,

(*a*) *Rex* v. *Mortlock*, 3 T. R. 300.

that by the wording of it the defect in the title of the defendant is absolutely and unconditionally cured; and therefore that the power of the court is so tied up that we can give no judgment against the defendant. I think that such construction is a monstrous one, and would often be attended with great injustice, and I think that the words of the act do not force us to adopt it. The discontinuance is, I think, subject to the terms of the payment of costs. It is true that the act does not express this formally; it does not directly say that the defendant must come in and pray for a discontinuance, and tender the costs, still I think that this must be presumed to be its meaning upon a fair and reasonable interpretation of it.

Cases could easily be put where a different construction would be attended with very great injury as well as injustice. Here but trifling costs have been incurred; the proceedings are only preliminary. But suppose that the case had gone to trial, the defendant's title being defective, and all the justice of the case being against him; could he be permitted to say to the relator, "My title has been cured by the act; I shall not stir; I shall take no steps; you yourself must defray all the costs you have incurred in a proceeding which I admit to be rightful from the commencement of it." I think that certainly he could not, and therefore, since the defendant has not come in and tendered the costs required, this rule must be made absolute.

Rule absolute.

RAWSON *v.* EICKE.

ASSUMPSIT. 1st count, for the use and occupation of a certain messuage; 2nd, on an account stated. The particulars of demand stated, that the action was brought to recover the sum of *52l.* 10*s.* for half a year's rent of a house at St. Leonard's, due 25th December, 1836.

At the trial before *Littledale*, J., at the Lewes summer assizes, 1837, it appeared that the house in question had belonged to a builder of the name of *Homan*; that on the 28th April, 1835, *Homan* made the following agreement with the defendant:—

"An agreement made the 28th day of April, 1835, between *Benjamin Homan*, of St. Leonard's-on-Sea, in Sussex, builder, of the one part, and *Charles Eicke*, of the same place, of the other part. *B. Homan* agrees to make and execute unto the said *C. Eicke* a good and valid lease of all that messuage, &c. situate on the Marina, St. Leonard's, and numbered 67, together with all cellars, &c. and appurtenances thereunto belonging: to hold to contain a covenant on the part of *E.* to pay the said rent; also to repair (damages by fire excepted); also a proviso for re-entry on non-payment of the rent twenty-one days after the same shall become due, or on non-performance of any of the covenants on the lessee's part to be performed. And *E.* agrees to accept of such lease and to execute a counterpart thereof. And *E.* further agrees (when and so soon as the messuages on either side of the said messuage shall become tenanted) to pay *H.* the additional rent of *15l.* during the remainder thenceforth to come of the said term. And *H.* agrees, on or before June next, to erect eight light panels in front of the drawing-room windows, to paper hall and staircase, &c. &c. And it is hereby agreed, that by the said lease hereby to be granted, the rent reserved shall be *120l.*; and that, by a separate deed to bear date the day next after the said indenture of lease, *H.* shall release to *E.*, out of the annual rent of *120l.*, the annual sum of *15l.* The said *E.* to prepare lease at his own cost, to be approved of by the lessor's solicitor.

"N. B. It is agreed that *H.* may have the opportunity of making the lease fourteen years."

1. The following instrument is an agreement and not a lease: "An agreement made on &c. between *H.* &c. and *E.* &c. *H.* agrees to make and execute to *E.* a good and valid lease of all that messuage, &c.; to hold to *E.* for seven years, from &c. to &c., at the rent of *105l.* payable half-yearly, the first payment to be made on &c. And it is hereby agreed, that the said lease shall

2. After execution of the agreement for a lease of certain premises the lessor mortgaged them.

Held, That the mortgagee having given notice to the tenant under the agreement to pay the rent to him, might maintain an action of use and occupation against such tenant, in respect of his occupation since the mortgage and notice.

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the said *C. Eicke*, executors and assigns, for the term of seven years from the 24th day of June next, at and under the yearly rent of 105*l.*, clear of all taxes and assessments (except the land-tax), payable half-yearly, the first half-yearly payment to be made the 25th of December next. And it is hereby agreed, that the said lease shall contain a covenant on the part of the said *C. Eicke* to pay the said rent; also to keep the said premises in repair (damages by fire excepted); also a proviso for re-entry on non-payment of the said rent by the space of twenty-one days after the same became due, or non-performance of any of the covenants on the lessee's part to be performed. And the said *C. Eicke* agrees to accept of such lease as aforesaid upon the terms and conditions above specified, and to execute a counterpart thereof. And the said *C. Eicke* further agrees (when and so soon as the messuages or dwelling-houses on either side of the said messuage hereby agreed to be demised shall become tenanted and occupied) to pay to the said *B. Homan* an additional yearly rent of 15*l.* during the remainder which shall be thenceforth then to come of the said term of seven years. And the said *B. Homan* agrees, on or before the 24th day of June next, to erect eight light panels in front of the drawing-room windows, and fence blinds to same windows, to paper the hall and staircase, and all the rooms, save those on the basement and attics; also to place, set, and fix a range in kitchen, with boiler and oven, and stoves in all the rooms having fire places; also to fix and hang the bells and knocker on the front entrance door; to complete the pantry windows, and to lay on the water, and to paint in imitation of marble the chimney-pieces in the dining and drawing-rooms. And it is hereby agreed, that by the said lease hereby agreed to be granted, the rent reserved shall be 120*l.*; and that by a separate deed, to bear date the day next after the said indenture of lease, the said *B. Homan* shall release to the said *C. Eicke*, out of the said annual rent of 120*l.*, the annual sum of 15*l.* Witness our hands. The said *C. Eicke* to prepare lease at his own cost, to be approved of by the lessor's solicitor.

"N. B. It is agreed that Mr. *Homan* may have the option of making the lease fourteen years."

This instrument was stamped as an agreement. On the 25th of July, 1835, *Homan* mortgaged the messuage in question to the plaintiff for ninety-nine years. It was proved that the defendant was in the occupation of the messuage during the half year for which the rent was claimed by the plaintiff, and had received from the plaintiff notice to pay the rent to him. Upon the instrument being offered in evidence on the part of the plaintiff it was objected; 1st, That such instrument amounted to a lease, and was therefore inadmissible for want of a proper stamp; or 2nd, That if it was rightly stamped as an agreement, then *Homan* and not the plaintiff was the party to sue upon, as there could be no assignment of a chose in action. The learned judge directed a verdict for the plaintiff, but reserved leave to move to enter a nonsuit.

Platt now moved for a rule, on the grounds taken at the trial.

Cur. adv. vult.

Lord DENMAN, C. J., on the following day delivered judgment:—We have

conferred with my brother *Littledale*, and think that the instrument was rightly received in evidence. It was rightly stamped as an agreement, and is not open to the objection which has been urged in the alternative, as this was an action for mere use and occupation, which had been actually enjoyed.

Rule refused.

DOE *d.* PLEVIN and NEWALL *v.* BROWN and another, Assignees of JOHN PLATT.

Lessor assigned premises and at his request lessee signed an acknowledgment of the assignee's title, and also paid him 1*s.* in pursuance of such acknowledgment: lessor afterwards became a bankrupt. *Held*, on ejectment brought by such assignee against the assignees under the bankruptcy, who defended as landlords of the bankrupt, that it was competent to them to shew that the above acknowledgment of title was procured by misrepresentation, and that the assignment was invalid.

EJECTMENT. At the Chester summer assizes, 1837. Verdict for the defendants, with leave to move to enter a verdict for the plaintiffs. *Evans* moved accordingly (*a*). (The facts of the case and ground of motion are fully detailed in the judgment of the Court.)

On a subsequent day in this term (Nov. 25) Lord DENMAN, C. J., delivered the following judgment:—This was an application to enter a verdict for the lessors of the plaintiff, under the following circumstances. The defendants defended as landlords of *Joseph Platt*, the tenant in possession. *John Platt* had demised to him in 1830. Subsequently he had become embarrassed; and in July 1836, assigned the premises and all his personal estate to the lessors of the plaintiff. He went with them to the dwelling-house, informed *Joseph* that he had so assigned, and requested him to give them an acknowledgment. Accordingly he gave them 1*s.* In September, 1836, the lessors of the plaintiff proposed to raise the rent, and *Joseph* signed the following memorandum:—

"I agree with *William Newall* and *James Plevin* to deliver up the peaceable possession of the Holywell Farm at the usual times of giving up the lands, and also to quit the house and premises at the usual times of giving up, to the above *William Newall* and *James Plevin*. As witness my hand, this 19th day of September, 1836: making Mr. *Joseph Platt* allowance for such improvements as may be considered by two impartial persons of right.

Signed, "*Joseph Platt*."

Subsequently a fiat in bankruptcy issued against *John Platt*, under which he was declared a bankrupt; and the defendants are his assignees. The contention in the cause was between the assignees under the assignment of July 1836, and those under the fiat, who dispute the validity of that transaction. It was insisted, however, on the part of the former, that in this action that question was not open, and that the defendants coming in to defend as the landlords of *Joseph* were in no better condition than he; and that he, after the payment of the 1*s.*, and the signing the memorandum, was estopped from disputing the title of the lessors of the plaintiff.

Supposing this question to be open, no dissatisfaction is expressed with the summing up or the finding of the jury; and the only point for us to consider is, whether the learned judge should have allowed the inquiry to be instituted.

We are very clearly of opinion that he was right in so doing. No general

(*a*) Nov. 6. before Lord *Denman*, C. J., *Patteson*, *Williams*, and *Coleridge*, Js.

Queen's Bench.

DOE *d.* PLEVIN and NEWALL *v.* BROWN and another.

rule, when rightly understood, is more important or more strictly to be observed than that which precludes the tenant from disputing the title of his landlord; and we may concede that, in the present case, the defendants stood in the same situation as *Joseph Platt*, and could avail themselves of no defence which was not open to him. But he had not received his possession first from the lessors of the plaintiff, nor was any attempt made to question that title under which he had received possession. Assuming that the 1*s.* was paid by way of acknowledgment, which we are informed by the learned judge was very questionable, still it was paid in the first instance upon the request and under the representations made by *John Platt*, and the memorandum signed only as a consequence of that payment, and upon the faith of the same representations. If, at the very time when *John Platt* informed *Joseph* of the assignment to the lessors of the plaintiff, he had committed an act of bankruptcy, and that assignment which he represented as valid was in truth void, he was practising a fraud on *Joseph*; and no case has decided that it would not be open to *Joseph* to explain under what circumstances he made any attornment or other acknowledgment. *Gregory* v. *Doidge* (*a*) is a strong and direct authority to the contrary. There was both the fact of 1*s.* paid as an acknowledgment of *Doidge*'s title, and an agreement with him, after a statement of the amount of the rent, to depasture some of his cattle in part payment of the rent. But this was done on the representation of *Doidge*'s brother, and in ignorance of a defect in his title: and the Court of Common Pleas was clearly of opinion that, under these circumstances, the plaintiff, not having come into possession under *Doidge*, might shew that he was not his landlord. Had even *John Platt* been the lessor of the plaintiffs, it would have been open for *Joseph* to have shewn a cesser of his title before the day of demise; for that would have been consistent with the accepting possession from him. Upon the broad principle, however, that it is always open to a party, not guilty of laches, to explain and render inconclusive acts done under a mistake and through misrepresentation, we think this inquiry properly gone into; and, consequently, there will be no rule.

Rule refused.

(*a*) 3 Bing. 474.

PICKARD *v.* SEARS and another (*b*).

Trover. Pleas: 1. Not guilty; 2. That plaintiff was not possessed as of his own property.

The plaintiff having a mortgage upon the goods in question, which were afterwards taken under a *fi. fa.* at the suit of a third party, against the mortgagor, in whose possession they remained, allowed them to be sold to the defendants without giving notice of his claim, although he attended twice at the premises, on which the goods were seized, and knew that a sale was in contemplation. *Held* that, on the second issue, the opinion of the jury should have been taken whether he had not in point of fact parted with his property in the goods.

TROVER for machinery. Pleas: 1. Not guilty; 2. That plaintiff was not possessed as of his own property.

At the trial, before Lord *Denman*, C. J., at the London sittings after Trinity term, 1835, it appeared that the goods had belonged to one *Metcalfe*, who had mortgaged them to the plaintiff in January, 1834. In the following April, while they were in *Metcalfe*'s possession, they were taken under a *fi. fa.*, issued in an action against him, at the instance of a third party, and sold

(*b*) Decided in Easter term, 1837.

to the defendants. After the goods had been so seized, and before the sale, the plaintiff came twice on the premises, without making any claim or giving notice of the mortgage, and on other occasions he had interviews with the attorney for the execution creditor, and stated merely that he was himself a creditor of *Metcalfe's*, without giving notice of the mortgage, and would endeavour to borrow money for the purpose of releasing the goods. The plaintiff relied on the mortgage; the defendants, upon the sale to them, which was admitted to be *bonâ fide*, and contended that the fact of the mortgagee standing by, without interposing, amounted to a concurrence on his part in the sale. His lordship directed the jury to find for the plaintiff, if they believed the mortgage to have been made *bonâ fide*. The counsel for the defendants then applied for leave to amend by inserting a plea of leave and licence. This was refused, and the verdict was found for the plaintiff.

Sir *F. Pollock*, in Michaelmas term following, obtained a rule nisi for a new trial.

Erle and *Sewell*, in Hilary term, 1837 (*a*), shewed cause, and contended that the concurrence of the plaintiff in the sale under the *fi. fa.* should have been specially pleaded.

Sir *F. Pollock* and *Cleasby*, *contrà*. If the plaintiff had given notice of his claim, the defendants would probably not have purchased. His case, therefore, is within the general rule, by which parties are estopped, after making admissions, on the faith of which others have been induced to act. *Per Bayley*, J., in *Heane* v. *Rogers* (*b*), and *per* Lord *Tenterden*, C. J., in *Graves* v. *Keys* (*c*).

Cur. adv. vult.

Lord DENMAN, C. J., in Easter term, 1837, delivered the judgment of the Court.—This was an action of trover for machinery and other articles, brought by a mortgagee of *Metcalfe*, the former owner, against a purchaser from the sheriff, under execution levied against that former owner. The pleas were: 1st. Not guilty; 2nd. That plaintiff was not possessed of the property as his own.

Sufficient evidence of a *bonâ fide* mortgage was adduced to prove that the property had been assigned to the plaintiff some months before the execution, and no doubt was ultimately made that the property was in fact his. The mortgagor had, however, remained in possession carrying on his trade till the execution issued, and the defendants made it plainly appear, that, even after the sheriff had entered, and even after the plaintiff knew that a sale was in contemplation, he had come to the premises and given no notice of his claim: on the contrary, he called on the execution creditor's attorney with the mortgagor, and consulted him about the state of affairs and the course to be taken. He stated, indeed, that he was *Metcalfe's* creditor to the amount of 500*l.*, but never spoke of the mortgage or claimed the goods as his own, though the attorney told him that he had some intention to sell them.

The defendants purchased *bonâ fide* and in total ignorance that the plaintiff had any interest. The bill of sale was executed on the 12th of August, the

(*a*) Before Lord *Denman*, C. J., *Williams*, and *Coleridge*, Js.
(*b*) 9 B. & C. 586.
(*c*) 3 B. & Ad. 318, n.

Queen's Bench.

PICKARD v. SEARS and another.

plaintiff's first application was made in December, when he demanded the sum advanced; which being refused, he demanded the goods; they were refused also.

The difficulty was to give the defendants the benefit of these facts under the pleas on record. After I had summed up the evidence, an application to amend, by introducing a plea of leave and licence, was for obvious reasons refused.

The defendant's counsel then contended that the plaintiff's conduct amounted to a concurrence in the sale, so as to make him in truth the vendor, and divest the property. I thought there was no evidence of this, and declined to take the jury's opinion whether the facts proved it. We granted a rule for a new trial, being desirous of considering whether this view of the case ought not to have been submitted to the jury.

Much doubt has been entertained whether these acts of the plaintiff, however culpable and injurious to the defendants, and however much they might be evidence of the goods not being his, in the sense that many persons, and amongst others the defendants, would be naturally induced thereby to believe that they were not, furnished any real proof that they were not his. His title having been once established, the property could only be divested by gift or sale, of which no specific act was even surmised. But the rule of law is clear, that where one, by his words or conduct, wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time; and the plaintiff in this case might have parted with his interest in the property by verbal gift or sale, without any of those formalities that throw technical obstacles in the way of legal evidence. And we think that his conduct in standing by and giving a kind of sanction to the proceedings under the execution, offered facts of such a nature, that the opinion of the jury ought, in conformity to *Heane* v. *Rogers* (*a*) and *Graves* v. *Key* (*b*), to have been taken, whether he had not, in point of fact, ceased to be the owner. That opinion, in the affirmative, would have decided the second issue on the record in favour of the defendants.

Rule absolute.

(*a*) 9 B. & C. 686. (*b*) 3 B. & Ad. 318, n.

POWELL and others *v.* REES, Administratrix of REES.

Where the plaintiff had recovered damages against the defendant, as administratrix, for trespasses committed by the intestate in digging coal six months before his death, under the 3 & 4 *Will.* 4, c. 42, s. 2, *held*, 1, That an action for money had and received would also lie for the amount of coals taken and sold by the intestate *more* than six months before his death; and 2, That from the quantity of coal so taken, the jury might infer the amount of money so had and received.

ASSUMPSIT for money had and received by the intestate *Rees* to the use of the plaintiffs. Plea, Non-assumpsit. On the trial before *Coleridge*, J., at the Monmouth summer assizes, 1837, it appeared that the intestate, for more than six months previous to his death, and that since his death the defendant also, had trespassed in the plaintiffs' closes, by working coal-mines under them. Two actions of trespass had thereupon been brought by the plaintiffs against the defendant, one for trespasses committed by the intestate for six months before his death, under the 3 & 4 *Will.* 4, c. 42, s. 2, and the other for trespasses committed by the defendant herself; and verdicts had been obtained by the plaintiffs in both actions. The present action was brought to recover the amount of sales made by the intestate of coals taken by him, from the plaintiffs' close, *more* than six months before his death. Evidence

was given of the quantity of coal taken, but there was no direct evidence of the amount of money realized by the sales.

It was objected, that, as before the above statute no action in respect of such a trespass could be brought, and as this statute had limited the right of action to such trespasses only as were committed six months before the intestate's death, no action of tort could be brought for any trespass committed at any antecedent period; and that, as an action of tort would not lie, the plaintiffs could not waive tort and bring assumpsit. It was also objected that the plaintiffs were bound to give evidence of some specific sum received by the intestate. The learned Judge over-ruled the objection, but gave the defendant leave to move to enter a nonsuit. Verdict for the plaintiffs.

Talfourd, Serjeant, on a former day in this term (*a*), moved accordingly. *Hambly* v. *Trott* (*b*) is an authority to shew that this action is not maintainable; and the recent act amounts to a legislative declaration that, except as therein provided, no such action can be brought. The plaintiffs having sued in trespass for a portion of the damages in respect of the injury now in question, have made their election to treat it as a tort; they cannot, therefore, waive tort now and bring assumpsit. The defendants are also entitled to a rule, on the ground that no evidence was given of the amount of money had and received by the intestate. *Harvey* v. *Archbold* (*c*).

The Court held, that there was sufficient evidence to enable the jury to infer the amount of money received by the intestate, and refused the rule on that point. As to the other point, the Court took time to consider.

Cur. adv. vult.

Lord DENMAN, C. J. (Nov. 9) delivered the judgment of the Court.—In this case we disposed of one ground, on which a rule for entering a nonsuit was sought to be obtained, upon the hearing; it remains to decide upon another, which arose under the following circumstances. (His lordship then stated the facts.)

The present action was brought to recover damages for the proceeds of the sales of coals by the intestate, for the period antecedent to the six months before mentioned; and it was objected in the first place, generally, that no such action was maintainable; that the foundation of it was a tort, the remedy for which died with the person, and that the doctrine of waiving the tort and suing upon a contract implied by law, could not be extended to a case in which no remedy by action in tort existed to be waived. We were pressed, too, by the remark, that such an action was of the first impression, and by the inference to be drawn from the language of the section above mentioned, and from the remedy there given. If, however, the legal principles upon which the action is maintainable are clear, these considerations ought not to prevail. In the present case the money which has been produced by the sale of that which had been wrongfully severed from the plaintiffs' estate, and converted into chattels, is traced into the pocket of the in-

(*a*) *Nov.* 2, before Lord *Denman*, C. J., *Patteson*, *Williams*, and *Coleridge*, Js.

(*b*) Cowp. 371.

(*c*) 3 B. & C. 626.

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testate; it cannot be doubted that an action for money had and received would have been maintainable against him for that money. His personal estate has come to the hands of the defendant by so much increased, and we cannot see any ground why the same action is not to be maintained against her who represents him in respect of that estate. In the case of *Hambly* v. *Trott* (*a*), Lord *Mansfield* very fully considers this subject, and lays down the distinctions which arise as to the surviving of remedies upon the cause of action and the form of action. He observes, "There is a fundamental distinction; if it is a sort of injury by which the offender acquires no gain to himself at the expense of the sufferer, as beating or imprisoning a man, &c., there the person injured has only a reparation for the delictum in damages to be assessed by a jury. But where, besides the crime, property is acquired, which benefits the testator, there an action for the value of the property shall survive against the executor. As, for instance, the executor shall not be chargeable for the injury done by his testator, in cutting down another man's trees, but for the benefit arising to his testator, for the value or sale of the trees, he shall." The former part of this example illustrates the operation of the recent statute; in the latter, which is the present case, it was not needed.

But it was pressed on us, secondly, that at all events this action was not maintainable after recourse had been had to the statute just referred to, for that the plaintiffs having elected to proceed for damages for the trespass in fact, could not split it and sue in contract for the other part. The conduct of the plaintiffs may have been vexatious, but that furnishes no legal answer to this action, because, in truth, the intestate was guilty of a series of trespasses, and not of one single wrongful act. The plaintiffs, therefore, have only pursued different remedies for different injuries; they might indeed have recovered a compensation for all under the present form of proceedings, but they were not bound to do so. Upon the whole there must be no rule.

Rule refused.

(*a*) Cowp. 371.

DOBLE *v.* CUMMINS.

Where goods taken in execution were claimed by a third party, and the claimant and sheriff afterwards appeared under an interpleader rule, but the execution creditor did not, the Court ordered that the sheriff should withdraw from possession, and be discharged from all liability, but refused to bar the claim of the execution creditor.

CARROW, on a former day in this term, had obtained a rule in this case, under the Interpleader Act (1 & 2 *Will.* 4, c. 58, s. 6,) calling upon the plaintiff and one *Perkins* to state their claims to goods taken by the sheriff of Devon on a fi. fa. against the defendant. The plaintiff was the execution creditor of the defendant, and *Perkins*, after the seizure, had given notice that the goods in question had been assigned to him as a security for money lent by him to the defendant.

On a subsequent day *Lumley* appeared before *Littledale*, J., in the Bail Court, and *Carrow* for the sheriff, and no one appearing for the execution creditor, it was proposed that he should be barred. But *Littledale*, J., after referring to *Donniger* v. *Hinxman* (*b*), and *Lewis* v. *Jones* (*c*), sent the case to the full Court.

(*b*) 2 Dowl. P. C. 424.

(*c*) 2 M. & W. 203; *S. C.* 2 Gale, 211.

Lumley, for the claimant *Perkins*, afterwards (Nov. 22) contended that, though in *Donniger* v. *Hinxman*, *Littledale*, J. had refused to bar the execution creditor, who did not appear, the authority of *Lewis* v. *Jones* ought to prevail.—(*Patteson*, J. The claimant *Perkins* is the third party. The execution creditor is rather in the situation of plaintiff, and the sheriff in that of defendant.)

Carrow for the sheriff. The sheriff at all events must be relieved from all liability; *Eveleigh* v. *Salsbury* (*d*).

Per Curiam (*e*). The rule may be made absolute to the extent of requiring the sheriff to withdraw from possession, and of discharging him from all claim by the execution creditor.

Rule absolute.

(*d*) 3 Bing. N. C. 298.

(*e*) Lord *Denman*, C. J., *Patteson*, *Williams*, and *Coleridge*, Js.

COOK *v.* COOPER.

Where a defendant taken under a capias indorsed for 179*l*., gave a bail-bond for that amount, and the affidavit of debt was for 174*l*. only, the Court ordered the bail-bond to be cancelled, and a common appearance to be entered.

HUMFREY had obtained a rule to shew cause why the bail-bond given by the defendant in this case should not be cancelled, and a common appearance entered. The defendant had been taken under a capias indorsed to take bail for 179*l*., and the defendant had given a bail-bond to that amount, but the sum deposed to in the affidavit of debt was 174*l*. only.

Sir *John Campbell*, A. G., shewed cause. The amount indorsed on the capias was immaterial. The Uniformity of Process Act (2 *Will.* 4, c. 39, Schedule, No. 4,) is directory only, and this writ was good for the sum actually sworn to. The defendant ought not to have given a bail-bond at all, but should have applied to a Judge, to be discharged out of custody.

Humfrey, contrà, cited 1 *Arch. Prac.* by *Chitty*, p. 123. The bail-bond was not voluntarily given by the defendant, for he would have been detained until he gave it.

Lord DENMAN, C. J.—I cannot see that the recent act makes any difference in a case like the present. This writ would have been bad before the act. The writ is the operative part of the proceedings, which gives authority to the sheriff to arrest, and should be correctly indorsed.

PATTESON, J.—A writ indorsed for a larger sum than sworn to in the affidavit would have been bad before the act, and is so still.

WILLIAMS and COLERIDGE, Js. concurred.

Rule absolute.

Queen's Bench.

DOE *d.* REED *v.* HARRIS.

Testator, in the presence of a devisee under his will, with whom he was displeased, threw his will, contained in an envelope, into the fire. Devisee without his knowledge rescued it. The testator, when informed of this, expressed his annoyance and his intention to make a new will instead of it, without however taking any steps for either the destruction of the old or the making of the new will. *Held*, on ejectment as to copyhold property devised by the will, 1. That it was properly left to the jury to say whether the testator had revoked his will, although the act done by him with respect to it was not accompanied by any declaration of intention; 2. That his knowledge of the continuing existence of the will, intended to be destroyed, without taking any further steps to destroy it or to make a new one, did not afford any evidence of republication to be left to a jury.

EJECTMENT for lands in Glamorganshire. The statement of facts has been given in the former report (*a*) of this case, which related to freehold property. The present question related to copyhold only. At the trial before *Coleridge*, J., at the Glamorganshire spring assizes, 1836, the jury were of opinion that the testator had revoked his will, and found a verdict for the plaintiff. Leave was given to move to enter a nonsuit, or a verdict for the defendant. *Evans* in the following term having obtained a rule nisi,

Chilton and *W. M. James*, on shewing cause (*b*), cited *Vawsey* v. *Jefferey* (*c*), *Royden* v. *Maltster* (*d*), *Carey* v. *Askew* (*e*), *Tuffnell* v. *Page* (*f*), *Mortimer* v. *West* (*g*), *Doe* v. *Danvers* (*h*), Rolle's Abr. Devise, (O.), and *Walcott* v. *Ockterlony* (*i*).

Maule, *J. Evans*, and *E. V. Williams*, *contrà*, cited *Cranvell* v. *Sanders* (*k*), *Thomas* v. *Evans* (*l*), *Slade* v. *Friend* (*m*), and *Brotherton* v. *Hellier* (*n*).

Cur. adv. vult.

Lord DENMAN, C. J., in Hilary term (1838) delivered judgment:—This was an ejectment for copyhold premises, by the heir at law of the person last seised, against one who claimed as his devisee. The plaintiff succeeded at the trial, but leave was given to the defendant to move for a nonsuit, or for a verdict in her favour. On discussing a rule granted in conformity to this permission, the question was, whether the will (admitted to have been duly executed) had been well revoked. The facts lie in a narrow compass; the testator was much under the influence of the devisee, who lived with him as his housekeeper; but according to the testimony of a witness, to whom the jury gave credit, he had frequent quarrels with her, often complained of her behaviour towards him, and on one occasion, when irritated, he threw the will upon the fire; she rescued it without his knowledge, at which he expressed his displeasure when informed of it; the paper in which it was wrapped was thereby partially burnt, but the will itself was not affected by the fire. The devisee kept it until after the testator's death. These circumstances being established in evidence, the learned judge asked the jury, whether what was *then* done by the testator was an actual revocation of the will, and so intended by him. In another case, tried between the same parties, the same question has arisen, and, upon the same facts, the Court was of opinion that the will was not revoked. That ejectment, however, was brought to recover freehold lands, and our decision proceeded wholly on the express enactment of the statute of frauds, the words of which I do not here repeat. There the will itself was not burnt; we therefore thought that the statute prevented it from being revoked, and that no evidence whatever of what was

(*a*) *Ante*.
(*b*) This term before Lord *Denman*, C. J., *Patteson*, *Williams*, and *Coleridge*, Js.
(*c*) 3 B. & A. 462.
(*d*) 2 Roll. Rep. 383.
(*e*) 2 Bro. C. C. 58.
(*f*) 2 Atk. 37.
(*g*) 2 Sim. 274.
(*h*) 7 East, 299.
(*i*) Not reported.
(*k*) Cro. Jac. 497.
(*l*) 2 East, 488.
(*m*) 1 Wms. Saund. 278.
(*n*) 2 Sir G. Lee's Cases, 55.

said, proving an intention to revoke, could supply that deficiency. But the property now in question being copyhold, to which the statute of frauds does not apply, because it is not devisable within the statute of wills, the point is different, and must be treated as if the first-mentioned act had never been passed; in that case, the law would have required clear evidence of a positive declaration of the intent to revoke at the time such declaration was made, or some act done with the intent thereby to revoke, and the jury would have to determine whether, in fact, such declaration was made or act done. Some doubt has been entertained whether any declaration would be sufficient without the word "revoke:" but, upon full consideration, we think it impossible so to limit the testator's power of revocation, and that any equivalent word or words and expressions would be sufficient for that purpose. But further, we are now required to consider whether, without any language at all, a testator may revoke a will by the conduct he exhibits; and this appears to be tantamount to an inquiry, whether conduct *can* give a positive declaration of intent. If it can, there can be no more necessity for words than for the use of a particular expression. Now nothing is easier than to imagine such gestures and proceedings connected with the will, as must fully convince every rational mind, that the testator intended to revoke his will, and thought he had done so by the means he took for that purpose; but if he, who has power to revoke by declaring a present resolution then to do so, does in fact make that resolution manifest, it seems clear that the act of revocation is complete in every essential part. This proposition is not inconsistent with any authority in our books. Any doubt that may rest upon it may probably be the result of our habit of considering the subject since the statute of frauds. That law, one of the wisest in principle, though far from being complete in its details, or fortunate in its execution, enacts certain formalities for giving effect to the revocation of a will, and the obvious good sense of that provision has in some way embodied itself with our ideas of revocation. But the law, with respect to wills not within that statute, is the same as it was before the statute. This use was made of our former decision between the same parties; the will was intended to be revoked by burning, but the burning was not complete, and the will was held not to be revoked—it follows, as the revoking act was not performed, that there was no revocation. But this is clearly a fallacy. Burning a will is one of the modes of revocation permitted by the statute of frauds. It follows that there must be a burning to some extent to satisfy the enactment; but this is a case of revocation at common law, which only requires evidence of intention; and that evidence may be found in an imperfect act, or a mere attempt. The duty then of the judge, in trying a question as to such revocation of a will, was to lay before the jury the facts proved, and ask, whether they amount to a revocation; this was done on the present occasion. There was certainly evidence from which that inference might be drawn, and by which we think it was warranted. On this point, then, there is no ground for a new trial.

There was one other argument which requires notice. The testator was aware that his devisee had taken the will off the fire; he expressed his annoyance that she had recovered possession of it, and his intention of making a new will instead of it; yet he took no further steps towards its destruction, or making a new will; he was therefore said to acquiesce in its continuance, and the revocation itself was said to be revoked and the will revived.

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This state of things might certainly exist, and, if there was evidence of it, such evidence ought to have been submitted to the jury. But we cannot think that the mere knowledge of the continuing existence in specie of a will intended to be destroyed, when accompanied with no wish to restore its efficacy, but on the contrary, with great displeasure at its rescue from the flames, does constitute such evidence. The recent act for amending the law of wills (*a*) will probably prevent any future agitation of a case like the present, as the third section makes all property devisable, and the twentieth and twenty-second describe the mode of revoking wills and of reviving such as may have been revoked.

Rule discharged.

(*a*) 7 *Will.* 4 & 1 *Vict.* c. 26.

ARKWRIGHT *v.* CANTRELL.

The king by the same deed demised the lot and cope and all his mineral rights in a manor, and also appointed the lessee to the office of barmaster. The interests of the lessee being at variance with the duties of barmaster, *held*, that the appointment to such office was void.

DEBT. The declaration stated that the plaintiff was lord of the king's field, in the soke and wapentake of Wirksworth, in the county of Derby, and as such lord had an immemorial right to hold a court therein, called the Great Barmote Court, before his steward for the time being, to determine all questions arising within the lordship concerning the mines, groves, shafts, &c. within the lordship, according to the custom, &c. It then stated a custom to inquire into such questions at such Barmote Courts by a jury of twenty-four, who were to award as should be reasonable; and that if any person should cast in or fill up any grove or shaft of any miner or other person lawfully in possession thereof, such person so offending should forfeit 10*l.*, one half to the lord of the field or farmer, and the other to the *barmaster or steward*, and pay the party injured as much as would make good the work again. It was then alleged that at a Barmote Court, held on the 7th April, 1834, before *W. E. Mouseley*, the deputy to one *C. Clarke*, steward of our lord the king of the said court of the lordship, a jury, who had duly inquired concerning the filling up and casting in of a shaft, lawfully in possession of one *J. B.*, ordered, among other things, that the defendant should pay the sum of 10*l.*, one half to the lord of the field or farmer, and the other half to the *barmaster or steward*, according to the custom. It was then averred that the plaintiff was the barmaster, and that an action had accrued to him to recover the said moiety. The defendant pleaded, 1. That the Court was not duly held; 2. That the plaintiff was not the barmaster.

At the trial before Lord *Abinger*, C. B., at the Derby spring assizes, 1836, the plaintiff, to prove his title, put in evidence a deed of the 17th November, 1827, whereby the king, as lord of the Duchy of Lancaster, granted to the plaintiff the lot and cope and mineral rights in the soke and wapentake of Wirksworth for a term of years, and also granted to the plaintiff for a term of years the office of barmaster, with all fees and emoluments belonging to the same office. For the defendant it was contended that either this deed conveyed to the plaintiff the mere right of nominating another person to be barmaster, or that, if it nominated the plaintiff himself to such office, the appointment was void, as being incompatible with his situation as lessee of

the lot and cope. His lordship directed a verdict for the plaintiff, but reserved leave to the defendant to enter a verdict for the defendant.

M. D. Hill having obtained a rule nisi,

Sir *J. Campbell*, A. G., *Balguy*, and *N. R. Clarke*, now shewed cause. The deed clearly appoints the plaintiff himself barmaster, and has not given him the mere right of nominating another person. Nor is this office incompatible with that of lessee of the lot and cope. The barmaster has only a ministerial duty to perform in summoning the jury. He is not himself the judge, but appoints another person, who decides all questions in which he is interested, just as the crown appoints the superior judges and the lord of the manor appoints a steward, to decide questions in which the crown and the lord of the manor may respectively be interested. [*Patteson*, J. The grant does not oblige the barmaster to appoint another person to be judge, he may act himself.] If the two offices are incompatible that of lessee should be avoided, as there must be a barmaster, but there is no necessity for a lessee. The office of lessee should also give way as being the first granted: Com. Dig. Officer, (B. 6).

M. D. Hill, (with whom was *Humfrey*), contrà. The grant was the only evidence in support of the plaintiff's appointment, no custom was shewn to appoint the same person to both offices. The present grant is like the grant of an advowson; the plaintiff may appoint a barmaster but cannot act himself. [Lord *Denman*, C. J. In *Sir George Reynel's* case (*a*) it is said that an office, to which a trust is annexed, cannot be granted for a term of years.] The duties of the barmaster are set out in *Houghton's* Complete Miner, which was admitted to be read at the trial for both parties. It appears from that work that the custom was for the barmaster to be chosen by the miners and merchants themselves, and to be an indifferent person between them and the farmer, and that for certain defaults he is to be punishable by fines, payable to the farmer. He is also to regulate the measure by which the farmer's lot is to be taken. The plaintiff's interest as farmer, therefore, is directly at issue with his duty as barmaster.

Lord DENMAN, C. J.—I am of opinion that the office of barmaster is incompatible with the position occupied by the plaintiff as lessee. The office is one of great trust and confidence, and requires the personal discharge of many duties independent of any jury. If that be so I think he cannot appoint a deputy to do that which he is disqualified from doing himself. The same instrument which appoints him to be farmer appoints him barmaster, and the evidence afforded by that instrument alone fully justifies the jury, upon the issue whether he was barmaster or not, in finding that he did not fill that office. His appointment then to the office of barmaster being inconsistent with the situation of farmer was entirely void, because in contemplation of law he had as farmer a direct interest to violate the trust and confidence which are the essence of his office.

PATTESON, J.—I am entirely of the same opinion. The miner's articles

(*a*) 9 Rep. 95 a.

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make it clear beyond all doubt that the farmer cannot properly perform the duties required of the barmaster. It has been suggested that this conflicting interest in the same person may be a reason why the plaintiff should vacate one of his offices, but that, as the office of farmer was the first taken and not indispensably necessary, that office should therefore be vacated rather than the office of barmaster, which is of greater importance, and, indeed, cannot be dispensed with. But the character of farmer cannot be designated as an office, and even if it were I am not prepared to say, wherever a person is appointed to an office which may be incompatible with one previously occupied, that the first office is thereby vacated, and in *Rex* v. *Patteson* (*a*) the Court held that the acceptance of a second incompatible office did not avoid the first, though the holding the first made the defendant ineligible for the second. It is said, however, that all inconvenience in this case may be obviated by the appointment of a deputy to perform all the functions of barmaster. But there is no provision in the grant which renders it imperative upon Mr. *Arkwright* to appoint a deputy, and, if at the time the office was granted to him he was not in a situation to execute it properly, he cannot effectually get rid of his incapacity by any delegation to another person; and he would be in a most anomalous position, if in his character of farmer he were to be made liable to his deputy acting for him as barmaster.

WILLIAMS, J.—I am of the same opinion. The suggestion thrown out that the acceptance of a second incompatible office may vacate the first, and that therefore though the plaintiff may no longer be farmer, yet that he is still barmaster, cannot avail him under the circumstances of the case, for his situation as farmer is a benefit but not an office; and it is because that very benefit derived to him as farmer would conflict with the due discharge of his duties as barmaster, that we cannot consider him entitled to fill that office. It is said that all difficulty may be avoided by his appointing a deputy, but to say nothing of the influence which as principal he might be expected to retain over his deputy, the well known maxim "Qui facit per aliam facit per se," would oppose an insuperable answer to this expedient.

COLERIDGE, J.—I am of the same opinion. The interest of Mr. Arkwright as farmer is incompatible with the office of barmaster. The barmaster is called upon to adjudicate upon the conflicting interests of the lord and the miners. There is no difficulty in this case on the ground of immemorial custom. The evidence at the trial upon this point consisted of the lease only and of this single appointment: and even if there had been any custom it would not have been valid, according to *Wood* v. *Lovatt* (*b*). In *Rex* v. *Joliffe* (*c*) indeed a custom for the steward of a Court Leet to nominate certain persons to the bailiffs to be summoned on the jury, was held to be a good custom; but *Wood* v. *Lovatt* was cited and not impugned. In *Wood* v. *Lovatt Lawrence*, J. observed, that Bro. Abr. which had been cited to shew that an amercement at a Court Leet for a private injury to the lord was good by custom, was not warranted by the case in the Year Books to which it referred. I think also that the present is not the case of a party

(*a*) 4 B. & Ad. 9. (*b*) 6 T. R. 511. (*c*) 2 B. & C. 54.

holding two incompatible offices so as to raise any question whether the acceptance of the latter office would vacate the former, but simply a case of the appointee to a single office having an interest at variance with his duty.

Rule absolute.

BRODERICK *v.* HOLLINGSWORTH.

THE declaration, in assumpsit on a policy of insurance upon the ship *Angerstein*, at and from any port or ports, place or places, whatsoever and wheresoever, for twelve calendar months, commencing on, &c. alleged that during the said twelve calendar months, and whilst the said ship was attempting to prosecute a voyage, to wit, on &c., the same was by the perils and dangers of the seas broken, damaged, spoiled and destroyed, and was wholly lost to the plaintiff.

Plea, that after the making of the said policy, and during the time the said ship was insured, and before the said loss, the said ship was greatly broken, damaged, shattered, loosened, and unseaworthy; but the same by and with reasonable care and diligence in that behalf, and at a very small costs, as compared with the value of the ship, might and could, and ought to have been by the plaintiff repaired, amended, and rendered seaworthy, yet the plaintiff, well knowing the premises, did not nor would repair, amend, and render the ship seaworthy, but wholly refused and neglected so to do, and she so remained and continued in such unseaworthy condition until the time of the loss in the declaration mentioned. Verification &c.

Special demurrer, on the ground that the plea did not aver the loss to be in anywise caused by the plaintiff's not repairing.

To a declaration on a time policy of insurance on a ship, alleging a loss by the perils of the sea, a plea, that after the making of the policy and before the loss, the ship was unseaworthy, but might with reasonable care and for small cost have been repaired by the plaintiff, yet that he well knowing the premises, did not repair, and that the ship continued unseaworthy until the loss, was held bad on special demurrer, on the ground that it should at all events have averred distinctly that the plaintiff knew of the unseaworthiness, and that the loss happened through the want of repair.

Quære, would the plea have been good if it had contained such averments.

Martin, in support of the demurrer. There is an implied warranty in marine insurances that the vessel is seaworthy at the commencement of the voyage, but not that she shall continue so throughout the voyage, per Lord *Mansfield*, C. J. in *Eden* v. *Parkinson* (*a*), and *Bermon* v. *Woodbridge* (*b*), and *Watson* v. *Clark* (*c*).—[Lord *Denman*, C. J.—Does not the plea aver in substance something more than unseaworthiness after the commencement of the voyage, namely, that the loss happened through want of repair?]—Injury to a certain extent is admitted, and though the declaration alleges a total loss, yet a partial loss may be recovered notwithstanding: 2 *Wms. Saund.* 203, *n.* 18. Again, the plea does not state that it was the duty of the plaintiff to repair, and there is certainly no stipulation to this effect in the policy. Questions as to the propriety of repairing have often been raised, but merely for the purpose of turning a total into a partial loss. Lastly, the plea does not state that the loss happened from the plaintiff's neglect to repair.

R. V. Richards, contrà. The plea is, in substance, that the vessel became unseaworthy after the risk commenced, and that the loss happened from the alleged want of repair. In all time policies the vessel must not only be seaworthy at the commencement of the risk, but must be kept so throughout

(*a*) 2 Doug. 732, a. (*b*) 2 Doug. 789. (*c*) 1 Dow, P. C. 336.

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by all needful reparation, as, if on going down the river she were to lose her jib-boom, the captain would be bound to put in and repair, and in like manner in case of any material injury occurring at sea. This case is not to be distinguished in principle from *Law* v. *Hollingsworth* (*a*), in which case the captain neglected to keep a pilot on board on coming up the river.—[Lord *Denman*, C. J.—The plea does not say there was an opportunity to repair.]—It says that the vessel might and could have been repaired at a very small cost. If the means of repairing were not conveniently at hand there might be a question on that point for the jury, but enough for the defendant's purpose is admitted generally by the demurrer.—[*Patteson*, J.—*Law* v. *Hollingsworth* was perhaps decided with reference to the statute, which requires a pilot to be taken on board.]—Lord *Kenyon*, C. J. expressly said, "I do not feel that I am bound in this case to decide whether or not it be necessary that there should be on board the vessel a pilot qualified according to the act of parliament referred to. This case may be disposed of without deciding that question." The cases from *Douglas* need not be questioned, but they decide no more than that primâ facie the insured discharges his duty by having the vessel seaworthy at the commencement of the voyage, but the plea in this case charges the loss to have happened through negligence to repair.—[*Patteson*, J.—The plea does not say the plaintiff knew that repairs had become necessary. It says that the plaintiff well knowing the premises did not repair.]

Martin in reply. If *Law* v. *Hollingsworth* applies, it may be considered as overruled by *Bishop* v. *Pentland* (*b*), and *Busk* v. *The Royal Exchange Assurance Company* (*c*), in the latter of which cases there was very great negligence, for the whole of the crew had left the vessel.—[*Patteson*, J.—None of those cases were on time policies.]—This loss occurred in the course of the voyage within the stipulated time. Negligence of the shipowner's servants is one of the risks insured against. At all events the plea gives no answer whatever to the allegation of partial loss.

Lord DENMAN, C. J.—The defence of unseaworthiness has generally been applied to the condition of the insured vessel at the period of commencing her voyage. That is not the case here, but it is stated that the vessel became unseaworthy subsequently, and that it might have been repaired by the plaintiff at a small cost. I have some doubt whether, if the plea had averred that she became unseaworthy by the gross negligence of the shipowner, it would not have furnished a defence, though certainly one of a novel character, if not dangerous in principle. But this plea does not even aver distinctly that the plaintiff was cognizant of the precise condition of the ship, it merely states generally, that he well knew the premises &c., and in the second place, it does not aver that the reparation might have taken place before the loss happened.

LITTLEDALE, J.—The warranty of seaworthiness applies to the state of the vessel on commencing her voyage, and, if she become unseaworthy very shortly after, the warranty may nevertheless have been fully complied with.

(*a*) 7 T. R. 160. (*b*) 7 B. & C. 219. (*c*) 2 B. & A. 73.

I do not say whether it would or would not be a defence, that by the default of the captain during the voyage the vessel became unseaworthy, that her state was well known to him, yet that he did not repair, and that the loss happened in consequence. The present plea, however, does not let in such a defence; it substantially says no more than that she became unseaworthy, for the allegation, that she became damaged, shattered, and loosened is nothing, and the smallest possible injury might be meant by it. The words, "well knowing the premises," are insufficient to fix the plaintiff with knowledge of her condition. Even if the unseaworthiness supervened within the plaintiff's knowledge, the declaration has not been answered, for it is not even stated that the loss happened from the want of repair. I think the plea bad.

PATTESON, J.—I am of the same opinion. The plea does not state that the loss took place through the plaintiff's neglect to repair in time. The implied warranty of seaworthiness is satisfied, if the ship be seaworthy at the commencement of the risk. The unseaworthiness here alleged is of the ship itself, which is a very different case from unseaworthiness arising from want of a particular crew during a voyage requiring a variation of the crew at particular places. Suppose then, after the voyage has commenced, something to occur through the default of the owner, and the loss to be traced to it; I think the defence would be, not on the breach of warranty, but on the neglect of the owner. It is contended that the warranty of seaworthiness extends over the whole time of insurance if the owner has any opportunity of repairing, but I am not aware of any authority for this position. There is not, I think, any distinction in this respect between time policies and others.

Judgment for the Plaintiff. (*a*)

(*a*) *Williams*, J. was absent.

PEARSON, Assignee of JAMES GRAHAM, *v.* ANDREW GRAHAM.

TROVER for goods possessed by the plaintiff, as assignee of the bankrupt, and converted by the defendant after the bankruptcy. Pleas: 1. Not guilty. 2. That *James Graham* was not a bankrupt. 3. That the plaintiff was not lawfully possessed modo et formâ. On the trial before *Tindal*, C. J., at the Westmorland summer assizes, 1835, it appeared that the defendant was the brother of the bankrupt, and assisted him in his business. On the 24th July, 1834, the bankrupt committed an act of bankruptcy by leaving his place of abode (to which he did not return) with the intention of avoiding his creditors. The defendant, on the next day, acting

After a trader had committed an act of bankruptcy, the defendant, who assisted him in his business and was ignorant of such bankruptcy, in pursuance of a general authority for that purpose, sold some of his master's goods and applied the proceeds for his benefit. More than two months after the sale a fiat issued against the trader. In trover by the assignee for a conversion of these goods, the defendant pleaded, 1. Not guilty. 2. That the plaintiff was not lawfully possessed. *Held*, 1. that the defendant, as he had received no express orders to sell the goods, but acted under a general authority only, was guilty of a conversion, and that if the particular circumstances attending the sale afforded any defence, they should have been specially pleaded. 2. That the sale by the defendant was not protected by 6 G. 4, c. 16, s. 81, as he was a *third* person and the purchaser was the person dealing with the bankrupt, with respect to whose ignorance of the act of bankruptcy, so as to validate the sale, there had been no finding by the jury.

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as his servant, sold the goods in question, which the purchaser, after paying the full value of them, took away. The defendant applied the proceeds to the payment of some of the bankrupt's debts. The fiat of bankruptcy issued more than two months afterwards. The jury found that the defendant acted under his general authority, and that he did not at the time of the sale know of the act of bankruptcy; but no question was submitted to them as to the knowledge of the purchaser. The learned judge directed the verdict to be entered for the plaintiff, but reserved leave to the defendant to move to enter a nonsuit.

Blackburne in the following term having obtained a rule nisi,

Cresswell and *Wightman* shewed cause. The title of the plaintiff, as assignee, to the goods in question, related back to the time when the act of bankruptcy was committed, and the sale by the defendant on the following day was undoubtedly a conversion of them, so as to render him liable in trover. Section 81 of the 6 *Geo.* 4, c. 16, which protects dealings by and with any bankrupt more than two months before the issuing of the commission, applies only to the bankrupt and to the person dealing with him, and therefore does not protect the sale, which in this case was made by a third person. Nor does section 82, which applies only to payments made to the bankrupt himself, afford any defence. If the particular circumstances of the sale afford any defence, they should have been specially pleaded, but under the present issues, the plaintiff is entitled to retain the verdict.

Alexander contrà. The sale was made by the defendant as agent for the bankrupt, and an agent has frequently been protected under circumstances similar to the present; *Coles* v. *Robins* (*a*), *Coles* v. *Wright* (*b*), and *Tope* v. *Hockin* (*c*). The defendant's conduct therefore did not amount to a conversion. But the plaintiff was not possessed of the goods, so that the pleadings are sufficient to let in the present defence. The goods had been sold more than two months before the issuing of the fiat, and the property in them was transferred to the purchaser under 6 *Geo.* 4, c. 16, s. 81. The payment also is protected by the 82nd section, for the payment to the defendant, as agent, was a payment to the bankrupt himself. Trover could not be maintained against the purchaser, *Hill* v. *Farnell* (*d*), and *Cash* v. *Young* (*e*).

Cur. adv. vult.

Lord DENMAN, C. J. (after stating the facts of the case as above), now delivered the judgment of the Court.—Upon this state of facts two questions arise: first, whether the defendant did convert the goods at all; and, secondly, if he did, whether the plaintiff, as assignee, was possessed of them; or, in other words, whether any property in them passed to him by the assignment of the commissioners.

As to the first question, it might be very doubtful whether a servant delivering goods by his master's order could be said to have converted those goods as against the assignees of his master. *Coles* v. *Wright* (*f*) rather seems

(*a*) 3 Campb. 183.
(*b*) 1 Taunt. 198.
(*c*) 7 B. & C. 101.
(*d*) 9 B. & C. 45.
(*e*) 2 B. & C. 413.
(*f*) 4 Taunt. 198.

except those within a fourth township, called Horbury. The question was, to shew that he could not. But in the present case, the defendant had received no express orders as to the goods in question, but took upon himself, under a general authority, to sell and deliver them at a time when, as it afterwards turned out, his master had absconded and abandoned all control over his property. This was a sufficient dealing with them to constitute a conversion, unless by any other facts the defendant could shew that he was justified in what he did, and then such justification should have been put on the record by way of special plea.

The next question therefore arises, viz., whether the property in these goods passed to the plaintiff as assignee, under the assignment of the commissioners. Now, assuming that it would pass by relation to the act of bankruptcy, that is, from the 24th July, still it is contended that the sale is protected and rendered valid by the 81st section of the 6 *Geo.* 4, c. 16, and that the plaintiff had, in consequence of that section, no property and no possession, actual or constructive. That section renders valid all conveyances by, and all contracts and other dealings and transactions by and with any bankrupt, bonâ fide made and entered into more than two calendar months before the date and issuing of the commission against him, notwithstanding any prior act of bankruptcy, provided the person so dealing with such bankrupt had not at the time of such conveyance, contract, dealing, or transaction, notice of any prior act of bankruptcy. In this case the transaction was more than two months before the commission, and the defendant had no notice of a prior act of bankruptcy. But the defendant was not the person dealing with the bankrupt, he was the agent or servant of the bankrupt, and the person dealing with the bankrupt was the purchaser. In order therefore to render the transaction valid, the jury should have been satisfied that the purchaser had no notice of a prior act of bankruptcy, as to which no question was put, nor, as it should seem, any evidence offered. The onus of shewing the validity of the sale, in order to raise the question of property or no property in the plaintiff, (assuming that it could be so raised) lay with the defendant; and as he failed in showing the validity, the general rule applies, and the property was in the plaintiff by relation.

A further question arises on the 82d section, which provides that all payments really and bonâ fide made to a bankrupt before the date and issuing of a commission, shall be deemed valid, notwithstanding a prior act of bankruptcy, provided the person so dealing with the bankrupt had not, at the time of such payment to him, notice of any prior act of bankruptcy, *Cash* v. *Young* (*a*), and *Hill* v. *Farnell* (*b*), are authorities to shew that a payment on a ready money purchase is within this section; but still, as before, the point for the jury is, whether the person paying had notice of an act of bankruptcy, and that point was not submitted to the jury. The former observations therefore apply, and the rule for entering a nonsuit must be discharged.

Rule discharged.

(*a*) 2 B. & C. 413. (*b*) 9 B. & C. 45.

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Prohibition. The declaration stated that the plaintiff had been rated for the repairs of the parish church, under a rate levied upon three only out of four townships constituting the parish, whereas the fourth township was also liable. Plea, that the fourth township had from time immemorial a chapel of its own, at which the inhabitants had enjoyed divine rites, that the costs of repairing such chapel had been exclusively paid by such inhabitants, who had never been rated for the repairs of the parish church, absque hoc, that all four townships were rateable for such last mentioned repairs. *Held*, that the plaintiff had not by joining issue on this traverse, admitted the facts stated in the inducement of the plea. 2. An amended plea, setting out the same facts as the former plea, but concluding with an averment that the fourth township was not rateable, and with a verification, having been found for the defendants, *held*, that it must be presumed, after verdict, that the chapel was coeval with the parish church and not a mere chapel of ease, and that the exemption of the fourth township might, therefore, be sustained. 3. The 3 *Geo.* 4, c. 72, s. 20, enacts, that all churches built by virtue of the 58 *Geo.* 3, c. 45, in aid of the churches of the parishes or *places* in which they shall be situated, shall be repaired by the parishes or *places at large* to which such chapels shall belong. *Held*, that a township, which had been always exempt from all rates for the repairs of the parish church, was not liable to be rated for the repairs of a chapel, built under these acts, and situated within another township.

PROHIBITION. The declaration stated—whereas the parish of Wakefield, in the county and division of York, had immemorially been an ancient parish, with a parish church belonging to it, and had been divided into four townships, viz. Wakefield, Stanley-cum-Wrenthorpe, Alverthorpe-cum-Thornes, and Horbury, and the inhabitants of the said townships were liable to contribute to the repairs of the parish church; and whereas, since the 3 *Geo.* 4, c. 72, three chapels had been built within the said parish by virtue of the said act and other acts then in force for building additional churches in populous parishes; viz. one chapel in Stanley, appropriated to an ecclesiastical district ascertained under the said acts; another chapel in Alverthorpe also appropriated, and another in Thornes not appropriated; and whereas, by the said acts and by the law of the land, the repairs of the said district chapels of Stanley and Alverthorpe ought to be made by the parish at large, or by the districts to which they belonged, by rates to be raised within the districts respectively, and the repairs of the chapel in Thornes by the parish at large; and whereas in the vestry of the said parish church, on &c., the churchwardens and the inhabitants of the said parish, or the major part of them, made a rate upon the parishioners, inhabitants of the said parish, for certain repairs of the parish church, by which rate the parishioners, inhabitants of the township of Horbury, were not rated to the repairs of the said church, and the parishioners, inhabitants of the other three townships only by the said rate were rated to the said repairs; and whereas the plaintiff at the time of making of the said rate and thence hitherto hath been and is a parishioner, inhabitant of the township of Wakefield aforesaid—that the said defendants, churchwardens of the parish, well knowing, &c. but pretending that the inhabitants of Horbury are not liable to be rated to the repairs of the parish church, by reason of some supposed custom, prescription, or law of the land, and that the repairs of a certain chapel in Horbury have been immemorially by the inhabitants of Horbury only, and intending to aggrieve the plaintiff &c. The declaration then set out the libel of the defendants in the Ecclesiastical Court, which alleged that the parish church required repairs, which ought to be paid by a rate on the other three townships exclusive of Horbury, that the present plaintiff had been duly rated, and that the rate payable by him was still due. It then set out the plea to the libel, wherein the present plaintiff alleged that the exemption of Horbury, if any, ought to have been pleaded, and denied that he was properly rated. It then set out the answer of the churchwardens, alleging the exemption of Horbury, as having a chapel with all parochial rites, which chapel had been immemorially repaired by the inhabitants of that township &c.

The defendants pleaded, that the chapels in Stanley-cum-Wrenthorpe and

Alverthorpe-cum-Thornes were built in aid of the parish church, and that there then was and from time immemorial had been a church or chapel within the township of Horbury, the inhabitants of which enjoyed, and from time immemorial had enjoyed, all manner of divine rites and services, and that the costs of repairing the said church or chapel have been exclusively paid by rates upon the occupiers &c., within the said township; and that from time whereof &c., no rate for the repairs of the parish church of Wakefield had been laid upon any inhabitant of the township of Horbury, without this, that the inhabitants of the four townships, including Horbury, from time whereof &c., have been and are liable to repair the parish church of Wakefield in manner and form, concluding to the country. Issue was joined on the traverse.

On the trial before Lord *Lyndhurst*, C. B., at the York summer assizes, 1834, it was proved for the plaintiff that Horbury was situate within the parish of Wakefield; for the defendants, that for twenty-five years no church rates in respect of the parish church had ever been collected from the inhabitants of Horbury, that they did not attend the parish vestry, and that chapelwardens for Horbury were sworn in separately from those for Wakefield. His lordship, upon this evidence, thought that the defendants were entitled to a verdict, as all the facts in the inducement to the traverse were, in his opinion, admitted. Verdict for the defendants.

In the following term, *Alexander* obtained a rule nisi for a new trial, or for judgment non obstante veredicto.

Sir *F. Pollock*, Sir *W. W. Follett*, *Addison* shewed cause in Hilary Term, 1836.

Alexander and *Hoggins* were heard in support of the rule.

Cur. adv. vult.

Lord DENMAN, C. J. in the same term delivered the following judgment.—The plaintiff in prohibition complained of a church-rate laid on three only out of four townships, which compose the parish of Wakefield. The defendants claimed exemption for the fourth township (Horbury) in a plea alleging that it had a separate chapel of its own, and a custom to perform there all ecclesiastical rites, and to repair it by rates levied exclusively on its own inhabitants, and traversing the liability of all four to repair the parish church. Issue was joined on the traverse. On the trial at York, before Lord *Lyndhurst*, the plaintiff contented himself with proving that the township of Horbury was locally situate in the parish of Wakefield; the defendants then argued from the other evidence, that Horbury parish had a separate chapel where the rites were administered, and the learned judge interposed with an observation to the plaintiff's counsel that the evidence appeared very strong to that effect. The plaintiff's counsel required proof of separate rates being laid, but the judge then said that issue was joined on the liability traversed, and that all the inducement to that traverse was admitted by the plaintiff's taking issue on it. The jury thereupon found a verdict for the defendants, which we are now required to set aside, and grant a new trial or give judgment for the plaintiff non obstante veredicto; but we think it would be inexpedient to decide on this motion the question of

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law that may be raised to the validity of the plea, because the course taken at the trial in regard to the evidence appears to us to have been incorrect. For the traverse of liability, if wrong, as too general, cannot be called immaterial, since it was the very point on which the cause turned; and we do not see how the plaintiff, denying the traversed fact, can be supposed to have admitted all the particulars in the inducement, which are put forward as making up the general fact. If, on the other hand, the traverse was immaterial, within the meaning of the 13th rule of Hilary Term, 4 *Will.* 4, so as to authorise the plaintiff to pass over it and select a single fact for denial, he ought to have taken that course. As the pleadings stand, both parties are content to meet on the question of liability, and the defendants, on whom the burden of proving the exemption of Horbury falls, because it is against common right, were bound to make out all that was necessary to that end. The least they could do to entitle themselves to a verdict was to prove all the facts stated in the inducement. Now it is clear on consideration, though it struck my mind otherwise during the argument, that the mere facts of the chapel being kept in repair without coming upon the general rates of the parish, is no proof of the custom to repair it by means of a rate levied on the township, because it may have been preserved and repaired by voluntary contributions of the parishioners and others. It follows that the defendants, who have obtained a verdict in favour of the exemption from church-rates without proving that part of their plea, which avers the liability to chapel-rates, cannot be allowed to keep that verdict, and the plaintiff is entitled to a new trial.

Rule absolute for a new trial

After this rule was made absolute, the defendants amended their plea. The plea, as amended, retained all the averments in the inducement to the former plea, and, instead of concluding with a traverse as before, averred, that the inhabitants of Horbury had immemorially been exempt from all liability to contribute to the repairs of the parish church of Wakefield. Verification. The replication admitted that Horbury had never paid any rates for the repair of the parish church of Wakefield, and traversed all the other allegations in the plea.

The second trial took place before Lord *Denman*, C. J. at the York spring assizes, 1836, when the defendants again recovered a verdict.

In the following term a rule nisi was obtained to enter judgment for the plaintiff non obstante veredicto. The case was afterwards turned into a special case, and argued last term by

Alexander for the plaintiff, and *Cresswell* for the defendant.

Cur. adv. vult.

Lord DENMAN, C. J. now delivered the judgment of the Court.—This was a suit in prohibition, to restrain the parish officers of Wakefield from enforcing a rate for the repair of the parish church, and of three chapels belonging to three townships within the parish, two of which chapels were appropriated to districts, under the church building acts, and one was not so appropriated. The rate was imposed on all the occupiers within the parish,

whether they were properly omitted from the rate. The jury found a verdict in the defendants' favour at the summer assizes in 1834, and again, in substance, the same verdict on a new trial in the spring of 1836, though the plea had undergone some amendment. We are to determine, whether the amended plea states a legal exemption for that township from the common law liability to be taxed for the reparation of the parish church. The replication, on which the parties went to the country, after stating that the chapels of the three other townships were not built in aid of the parish church, on which, however, no dispute was raised, further alleged in denial of the plea, that there is not, from time whereof the memory &c., a church or chapel within Horbury, at which the inhabitants of that township receive and have immemorially received all manner of divine rites and services, and that the costs and expenses of repairing the said church or chapel, and of providing necessaries for the performance of the same, have not from time immemorial been defrayed by rates and assessments on property in Horbury, and that the inhabitants of Horbury are not exempted from the repairing of the parish church, but ought to be rated and assessed thereto. Then does the affirmative of these facts establish the exemption contended for? The plaintiff's argument was, that all may be true, and the township of Horbury may, notwithstanding, have had a church or chapel originally built in aid, or (as it is sometimes expressed) in *ease* of the parish church. It was said, even before time of memory, the parish might be first created and the church erected, and afterwards the chapel built; that all parochial rites may have been performed there, the inhabitants of the township taking upon themselves exclusively the burden of repairing it, in which state of things the defendants did not dispute that the liability to contribute to the repairing of the church would not be taken away. The plaintiff referred to *Gibson's Codex*, 197, (edit. 1761) p. 21 (edit. 1713). No reference was made to the constitution of *Othobon*, which is copied in the same vol. (p. 235, edit. 1713) "De oblationibus capellarum restituendis ecclesiæ matrici," which enjoins restitution of offerings from chapels to parish churches by chaplains, called "ministrantes in capellis hujusmodi quæ salvo jure matricis ecclesiæ sunt concessæ," which passage shows that chapels have existed without the reservation of any privilege to the mother church, or rather that a parish church and a chapelry may exist within the same parochial boundaries, without the relation of mother and offspring, but independent of each other, and most probably coeval. In the other place above-mentioned, *Gibson's* text is no doubt strong in its import; but it is needless to observe that that writer is not to be considered as an authority. The passage is made up of extracts from cases decided in our Courts, from which it will be found extremely difficult to deduce any rule of law whatever. In some it is said that a ground of exemption must be stated in pleading; in others, that the exemption should be directly averred, and that, if it is qualified with "ratione inde," it will be bad. In some cases it is holden, that to leave out of a church-rate certain parishioners or districts is no ground for prohibition; in others, the writ has been granted for that reason without any hesitation. In the case of *Aston* v. *Castle Birmidge* (*a*), the Court held, that the inhabitants of a chapelry, sued for a rate raised for repairing a parish church, did not

(*a*) Hob. 66; 2 Roll. Abr. 289.

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entitle themselves to a prohibition, by shewing that they had in fact repaired their chapel, and had performed there the rites of baptism and marriage, if they buried at the parish church. On all hands it was agreed that the mere fact of repairing their own place of worship gave no exemption. These authorities could hardly have supplied any safe rule for the decision of the present case; but at a later period Lord *Holt* had to deal with a case, the circumstances of which were almost identical with *Aston* v. *Castle Birmidge* (*a*), and though there was no necessity for laying down the principle on which legal exemptions must depend, yet he has explained it in a clear and satisfactory manner. In *Ball* v. *Cross* (*b*), he said "that by common law the parishioners of every parish are bound to repair the church. In the principal case, those of a chapelry may prescribe to be exempt from repairing the mother church, as where it buries and christens within itself, and has never contributed to the mother church; for in that case it shall be intended coeval, and not a later erection." But he observed, that "the chapel could only be an erection in ease and favour of them of the chapelry; for they of the chapelry buried at the mother church till *Henry* 8th's time, and then undertook to contribute to the repairs of the mother church." We have then the opinion of this learned judge, at a time when the doctrine of prohibition was far from obsolete, that where the chapelry has from beyond time of memory performed all its own parochial rites and services, it shall be intended coeval, and exempt from contribution. And such is the effect of the second plea. It might perhaps be argued that the fact of its being coeval ought to have been pleaded, and the opinion of the jury taken upon the proof; but in truth it seems much more reasonable to say that the law will presume its independence and coeval antiquity from facts susceptible of clear proof, which cannot be conceived to have existed if it were a mere chapel of ease. At any rate, if that fact is necessary to constitute exemption, it must be taken after verdict to have been proved to the satisfaction of the jury, who would unquestionably have drawn the inference from what they must have found in sustaining the defendants' plea.

Another point was made on the effect of the Church Building Acts, in connection with a local act for the parish of Wakefield, set out in the pleadings. That act, passed in the 55 *Geo.* 3, enacts that the parish church of Wakefield, and a chapel of St. John in Wakefield, are to be repaired by a rate, without saying on whom the rate is to be levied. The declaration also alleges, that the three new chapels have been, under the 58 & 59 *Geo.* 3, built within the parish. Now the 58 *Geo.* 3, c. 45, s. 70, imposes the repairs of district churches and chapels on the districts to which they may be assigned. The 59 *Geo.* 3, c. 134, s. 14, authorises and empowers churchwardens of any parish, with consent of the vestry, to raise money for the repair of any churches or chapels (i. e. any within the parish) on the credit of the rates; and the 3 *Geo.* 4, c. 72, s. 20, reciting that "doubts may arise as to the repairs of churches or chapels built under the provisions of the two former acts, or of this act," enacts "for remedy and prevention thereof, (i. e. of the doubts) that all churches built by virtue of those acts or under any local acts, in cases in which no provision is made relating thereto in such local acts, in aid of the churches of the parishes or places in which they shall

(*a*) Hob. 66; 2 Roll. Abr. 289. (*b*) 1 Salk. 164; Holt, 138.

be situated, shall be repaired by the respective parishes or places at large to which such chapels shall belong, and rates shall be raised for that purpose in like manner in every respect as for the repair of the churches of such parishes and places; and all the laws then in force for making, raising, levying and collecting rates for the repair of churches shall be applied and put in force for the making, raising, levying, and collecting such rates for the repairs of such chapels as fully and effectually, to all intents and purposes, as if the same were severally, separately and specially repeated and re-enacted in this act for that purpose as to the repairs of such chapels." From these clauses in the three acts, taken together, a right is claimed to rate the parish at large (of course including Horbury) for the repairs of the district chapels, as neither by the Church Building Acts nor the local act is any express provision made relating to the levy of rates. And if this liability had been thrown on parishes at large without places, the words could hardly have been satisfied by any other construction, but the addition of that word shews that other divisions besides parishes were considered capable of coming under the Church Building Acts; and the studious preservation of all laws then in force seems to keep the power of imposing rates precisely as it was then actually existing in each place. The *place* then for which rates may be imposed in respect of the new chapels in Wakefield is the whole parish, *minus* Horbury; for the law then in force excluded it from the parish for that purpose. We therefore think the plea good, as disclosing a substantial defence at common law, and open to no objection from the recent statutes.

Rule discharged.

The QUEEN *v.* Sir ROBERT BAKER, Treasurer of the County of Middlesex.

A RULE had been granted calling upon the defendant to shew cause why a mandamus should not issue, commanding him to pay to *John Clark*, clerk of the session of the delivery of the king's gaol at Newgate, the sum of 916*l.* 7*s.* 4*d.*, being the amount of fees due to him in respect of convicts capitally convicted and pardoned on condition of transportation or imprisonment; convicts sentenced to be transported; and convicts sentenced to be imprisoned and kept to hard labour in the House of Correction, instead of transportation, at the general sessions of the delivery of the king's gaol of Newgate, holden for the county of Middlesex, in 1831 and 1832.

When the above rule came on for argument, it was directed to be put in the form of a special case.

The special case stated, that by the 55 *Geo.* 3, c. 156, it was enacted "that the clerk of assize, clerk of the peace, or other clerk of the Court should be paid by the treasurer of the county the same fee as had been usually paid, or such clerk of assize, clerk of the peace, or other clerk of the Court was entitled to receive for the order of transportation of any offender. The 5 *Geo.* 4, c. 84, enacted that "the clerk of the Court shall be paid by such treasurer the same fee as hath been usually paid *and* he is lawfully entitled to receive for every order of transportation. Down to 1784 the clerk of the

1. The clerk of the session of gaol delivery of Newgate is not entitled either by ancient usage or statute to any fee in respect of convicts sentenced to hard labour.

2. He is entitled by statute to the fee usually paid in respect of convicts sentenced to transportation; and the Court granted a mandamus, for the purpose of ascertaining the amount of the fee usually so paid, although his predecessor had not for 25 years received any fee whatever.

Queen's Bench.

The QUEEN v. BAKER.

session of gaol delivery of Newgate was paid, in respect of every capital convict reprieved on condition of transportation, and for every felon sentenced to transportation, a fee of 6*s.* 2*d.*; but it did not appear that this fee had been paid since 1784.

By 5 *Ann*, c. 6, persons convicted of theft might be sentenced to hard labour, but no fee was payable in respect of such convicts to the clerk of the Court or other officer. By the 16 *Geo.* 3, c. 43, the sentence of hard labour was extended to other offences, and by sections 3 and 12, when any offender was ordered to hard labour, the clerk of the assize &c. was to give a certificate to the sheriff or gaoler, and by section 17, such clerk of assize was to be paid the like satisfaction that had been usually paid for the order of transportation of any offender. The recited provisions of this act were continued in force down to March, 1802, since which time the sentences to hard labour were imposed under the 5 *Ann*, c. 6, and 53 *Geo.* 3, c. 162, until the passing of 7 & 8 *Geo.* 4, c. 29. Since 1802, however, certificates have been sent by the clerk of the Court to the House of Correction with prisoners sentenced to hard labour there.

In 1778, Mr. *Deacon*, then clerk of the session of the delivery of the king's gaol of Newgate for the county of Middlesex, had a rule made absolute for a mandamus to the treasurer of the county of Middlesex, to pay him (Mr. *Deacon*) the same fees for persons convicted of felony and other offences, at the Old Bailey, in 1776, 1777, and 1778, and sentenced to hard labour, as had been usually paid in respect of convicts to be transported. These fees were subsequently paid to Mr. *Deacon* and to Mr. *Shelton*, his successor, until 1805. On the death of Mr. *Shelton* in 1829, Mr. *Clark* was appointed his successor.

The following were the questions for the Court.

Whether the clerk of the session of gaol delivery of Newgate is entitled to a fee of 6*s.* 2*d.* in respect of each person capitally convicted and pardoned on condition of transportation; of each person capitally convicted and pardoned on condition of imprisonment with hard labour; of each felon sentenced to transportation; and of each felon liable to transportation and sentenced to be imprisoned and kept to hard labour, or of either, and which class of offenders.

Sir *W. W. Follett*, (with whom was *Channell*) for the crown, cited *Fleetwood* v. *Finch* (*a*).

Sir *F. Pollock*, (with whom was *Addison*) was heard for the defendant, as to Mr. *Clark*'s right to fees in respect of transports, but was told that he need not argue against the other right insisted on to fees in respect of convicts sentenced to hard labour.

Per Curiam (*b*).—As to the fee claimed in respect of convicts sentenced to hard labour, we have no doubt. According to *Fleetwood* v. *Finch* (*a*), a fee is payable to a public officer only by ancient usage or act of parliament. Work done is not of itself sufficient. Now, as the punishment of hard

(*a*) 2 H. Bla. 220.

(*b*) Lord *Denman*, C. J., *Patteson*, *Williams* and *Coleridge*, Js.

labour originated with the 5 *Ann*, c. 6, the claim to a fee in respect of convicts sentenced to hard labour cannot rest on ancient usage; nor can it rest on the express allowance of statutes, as no such fee has been payable by statute since the 19 *Geo.* 3, c. 74 (1802). With regard to the fee claimed in respect of transports, the rule for a mandamus may be made absolute. It is clear that some fee is payable in respect of them, though it may be doubtful what has been the amount of the fee usually paid. That can be inquired into. The circumstance that Mr. *Shelton*, while in office, did not receive the fee, ought not to prejudice his successors.

Rule absolute for a Mandamus as to the fee on convicts sentenced to transportation.
Rule discharged as to convicts sentenced to hard labour.

WILTON *v.* CHAMBERS.

An attorney re-admitted in 1823 did not take out his certificate till 1826:—*Held*, that though he did not practise in the meantime, that his re-admission was void, and the Court ordered securities given to him for work done in 1826, after he had taken out his certificate, to be cancelled.

SIR *J. CAMPBELL* in Hilary Term last had obtained a rule nisi for setting aside a judgment and other securities obtained by the plaintiff from the defendant for business done by him as attorney for the defendant in and subsequent to the year 1826.

The affidavits shewed, that the plaintiff had been admitted an attorney in 1810, and that he had taken out his certificate until 1820. He then ceased to do so for three years, and in 1823 obtained a rule for his re-admission. He did not however take out any certificate until 1826, but did not practise in the interval. The ground of the rule was, that the plaintiff was disabled from practising as an attorney by the 31st section of 37 *Geo.* 3, c. 90.

Erle, *Cresswell*, *Shee* and *W. H. Watson* in this term shewed cause, and cited *Ex parte Jones* (*a*), *Coren* v. *Sharpe* (*b*), *Hilleary* v. *Hungate* (*c*), *Ex parte Smith* (*d*), *Ex parte Calland* (*e*), *Ex parte Richards* (*f*), *Ex parte Clarke* (*g*), *Ex parte Cunningham* (*h*), *Slack* v. *Wilkins* (*i*), *Ex parte Nicholas* (*k*), *Ex parte Matson* (*l*), and *Ross* v. *Hodgson* (*m*).

Addison, who shewed cause for the assignee of *Wilton*, (a bankrupt) relied on *Ex parte Jones*.

Sir *J. Campbell*, A. G., and Sir *W. W. Follett*, contrà, cited *Ex parte Watson* (*n*), *Ex parte Nicholas* (*k*), *Skirrow* v. *Tagg* (*o*), *Ex parte Bartlett* (*p*).

Cur. adv. vult.

Lord DENMAN, C. J., on a subsequent day in the same term delivered

(*a*) 2 Dowl. P. C. 451.
(*b*) 1 B. & Ad. 386.
(*c*) 3 Dowl. P. C. 56.
(*d*) 1 Chitt. 692.
(*e*) 2 B. & A. 315 n.
(*f*) 1 Chitt. 101.
(*g*) 2 B. & A. 314.
(*h*) 1 Bing. 91.
(*i*) 1 C. & M. 23.
(*k*) 2 Marsh. 123.
(*l*) 2 D. & R. 238.
(*m*) 3 A. & E. 224, *S. C.* 1 Har. & Wol. 265.
(*n*) 1 Chitt. 208.
(*o*) 5 M. & S. 281.
(*p*) 1 Chitt. 207.

ant. *Pulling* described himself to be a resident householder Ledbury Ward. He had taken no part in the election.

The affidavits in answer, stated that the revision had b under eminent legal advice, and that no business was actuall revision, as there were no claims for insertion on the burgess objection to the lists as made out by the overseers.

Sir *J. Campbell*, A. G., *Maule* and *Chilton*, shewed cause (*a*). tion to the revision of the burgess lists be sustained, neither nor any other members of the corporate body, can have an offices, so that the corporation will be dissolved: this is an ol present rule, and was entertained by the Court in *Rex* v. *Tre Rex* v. *Bond* (*c*).

Secondly. There is no good relator for this information. C nected with the borough; *Roberts* and *Pulling* are both b former voted at the election, and they both stand in the s in some respects with the defendant, which incapacitates the *Rex* v. *Bond*, *Rex* v. *Trevenen*, *Rex* v. *Parkyn* (*d*), and *Rex* v Lastly, the defendant's title is not invalidated by the mode burgess lists have been revised. By sectious 18 and 37, two to revise the burgess lists, and no distinction is made betw divided into wards and others. It seems that in Monmouth W nothing for the assessors to do. How then can the lists be vit the 43d section does apply?

Sir *W. W. Follett* and *Whately* contrà. *Pulling* is unexce relator, he is connected with the borough, and took no part in The objection to this rule, on the ground that it may lead to t of the corporation, will have no weight with the Court; it wa in *Rex* v. *White* (*f*). It is quite clear that the burgess lists c been revised by the assessors of the Mayor's Ward. The 4 express upon this point in all cases when boroughs are divided

to shew by what authority he claimed to hold the office of town councillor in the City of Hereford. The ground of objection to his title was, that the burgess roll for the Monmouth Ward in that city had not been revised, pursuant to the provisions of the 5 & 6 *Will.* 4, c. 76. This objection was stated in two ways; 1st, that the defendant had not been elected by a majority of burgesses duly inrolled; 2d, that no burgess roll existed at the time of his election. It appeared, that although Hereford had been divided into wards, and two assessors duly elected for each ward, yet instead of the burgess list for the whole city having been revised by the two assessors of the Mayor's Ward, pursuant to the 43d section of the act, two separate assessors had been elected for the whole city, under the 37th section, and the revision had been made by the mayor with them. If these two had no authority to form part of the court of revision, the court itself was never competently formed. The mayor was sitting alone, when by the statute he and two assessors are required to form the court. This objection is of so serious a nature, and received at the bar so insufficient an answer, that the rule undoubtedly ought to be made absolute, unless some one of the preliminary or personal objections which were made to it be sustainable. On these, the arguments mainly turned, and we took time to consider them. The affidavits in support of the rule were made by three persons of the name of *Cooke*, *Roberts* and *Pulling*. It was objected to *Roberts*, that he with a full knowledge of the objection to the burgess list now insisted on, had taken a part in the election in question, by being himself a candidate and voter therein; and to *Cooke*, that he had also taken an active part as an agent in the election, and besides had no such interest as qualified him to be a relator, being neither burgess nor inhabitant, but only a visitor there on certain occasions. It was not much insisted on that the information should be filed at the relation of either of these persons. But *Pulling* was put forward as a relator, against whom no objection existed, for he was an inhabitant of the city, subject to its municipal government, and therefore interested in the due election of the council, *Rex* v. *Hodge* (*a*), and although by his agent, *Cooke*, he had protested at the revision court against the legality of the revision, he had taken no part nor been present at the election for councillors. In the case of *Rex* v. *Symonds* (*b*), in which four persons made affidavits in support of a rule for a quo warranto, there were valid personal objections against three as relators, none existed against the fourth; but it was urged that as all were acting in concert no distinction could be made. The Court, however, made the rule absolute, the counsel avowing such fourth person to be the relator, and that he would be responsible for the costs. It was there indeed stated that the relator's affidavit "disclosed the whole ground on which the defendant's title was impeached;" and this case certainly could not stand on the affidavit of *Pulling* alone. We do not think that a material circumstance, nor is it relied upon by the Court in the decision cited. A relator's case will constantly depend in part on the testimony of those who, from want of interest or their previous conduct, could not be themselves relators. In such cases the Court will ascertain who is the real relator, and that he is sufficient. It will then distinguish between him and those who are merely his witnesses; and will not affect him by

(*a*) 2 B. & A. 334, n. (*b*) 4 T. R. 223.

their previous acts or declarations unless he be identified with them in such as disqualify him from being received as a relator. It was however urged in shewing cause that, if *Parry* be not duly elected, it is only because there is no good burgess list in existence; an objection which not only applies to all the councillors elected at the same time, but to all the existing burgesses, and shews that no future valid election can be made to any municipal office in the city. The force of this objection remains to be considered. It cannot be stated as a proposition of law, or as a settled rule of practice in this Court, that leave to file an information will not be granted, merely because the effect may or even will be to dissolve the corporation. That objection was recently made in the case of *Rex* v. *White* (*a*), and under the circumstances properly overruled. The facts of that case indeed hardly substantiated the objection; but our brother *Patteson* there stated that, "where the objection is in itself an individual objection, the circumstance of every member of the corporation being in a similar predicament to the person against whom the motion is made, is not a sufficient ground to refuse a quo warranto." And we all agree, that in itself and standing alone, it is not. But the argument at the bar in support of the present rule did not and could not stop short of denying all discretion in this Court as to originating proceedings in quo warranto. It was in effect asserted that, wherever a reasonable doubt is raised as to the legal validity of a corporate title, we are bound to grant leave to file the information. This proposition, however, is wholly untenable. Every case (and they are most numerous) which has turned upon the interest, motives or conduct of the relator, proceeds upon the principle of the Court's discretion. However clear in point of law the objection may have been to the party's abstract right to retain his office, yet the Court has again and again refused to look at it, or interfere upon one or other of these grounds. In the case of *Rex* v. *Trevenen* (*b*), *Abbott*, C. J. lays down the general rule in accordance with this view, and also incidentally directs its application to a case like the present. "In the case of individual members of a corporation, it is wholly within the discretion of this Court to say whether an information ought to be granted or refused; the Court has undoubtedly in some instances permitted these informations to be filed where the effect has been thereby to dissolve the corporation, but that has been where strong cases have been made out." Cases much earlier and nearer to the date of the statute of *Anne* may be found, which not merely lay down the rule, but shew that it had grown into the admitted practice of the Court. The cases of *Rex* v. *Dawes* and *Rex* v. *Marten*, or the Winchelsea Cases as they are called, are very remarkable in this point of view. They were often before the Court and well considered, and may be found in 1 *W. Bl.* 634, and 4 *Burr.* 1962, 2022, and 2120. In them Lord *Mansfield* treats the discretionary power of the Court not as a matter disputed or requiring proof, but as a settled principle to be applied. And in 4 *Burr.* 2123, he states the grounds on which the Court in those cases proceeded in the application of the principle. "1st. The light in which the three relators now informing the Court of this defect of title appear from their behaviour and conduct relative to the subject-matter of their information, previous to their making this motion. 2d. The light in which the application itself

(*a*) 1 N. & P. 84; *S. C.* 2 Harr. & Wol. 403. (*b*) 2 B. & A. 482.

manifestly shews their motives, and the purpose which it is calculated to serve. 3d. The consequences of granting the information." After examining the affidavits with these points in view, the rules were both discharged, though it appeared clear that the titles of both the defendants at the times of their election were invalid.

These seem to be grounds safely applicable to the present case. On the one hand, if the rule be made absolute, the dissolution of the corporation may at least be reasonably apprehended; on the other, it is remarkable that the affidavits in support of the rule impute no corrupt, fraudulent, or indirect motive for the acts complained of as irregular; nor do they allege that they have produced injustice, inconvenience, or even any one result different from what would have followed the fullest compliance with the law as they lay it down. They do not go the length of suggesting that a single vote has been won or lost, or that the burgess list would have varied in a single name. It appears moreover that the town-clerk had taken the precaution of procuring, and had bonâ fide acted upon the most eminent legal advice; and in fact neither claim nor objection, as regarded the Monmouth ward was made to the overseers' list. We do not say that the court of revision had, therefore, no duties to perform, but in fact they were not called upon to perform any, and the defective constitution of the court has been in all respects an immaterial circumstance. If these considerations would under the old law have been entitled to weight, they lose none from the passing of the recent statute. On the contrary, the difficulties that might attend the construction of corporations once dissolved, and the important functions now vested in the municipal bodies, would rather induce increased circumspection in our proceedings. The inferior officers ought indeed to conform with care to the provisions of the law, the wilful departure from them this Court will visit with severity, and even negligence may not always escape animadversion. But our discretion in the issue of quo warranto informations, must be regulated by a regard to all the circumstances which attend the application, and all the consequences likely to follow. Upon the whole, for the reasons stated, we act most in accordance with the current of authorities, with the statute of *Anne*, and with the public interest in refusing the permission prayed by the present rule. As there was great irregularity, however, in the appointment of the court of revision, we think that it ought to be discharged without costs.

Rule discharged.

The QUEEN *v.* The Inhabitants of HOCKWORTHY.

UPON an appeal against an order of justices, whereby *Elizabeth Thorn* was removed from the parish of Hockworthy in the county of Somerset, to the parish of Chipstable in the same County, as the place of her last legal

1. Where the settlement of the pauper in a third parish was the only ground of appeal stated by the appellants under 4 & 5 *W.* 4, c. 76, s. 81, *held*, that the respondents were not bound to make out any primâ facie case of settlement in the appellant parish.

2. Where an instrument not under seal purports to demise incorporeal hereditaments as well as land, and the sessions find that the land alone is worth more than 10*l.* a year, a settlement may be gained in respect of the occupation of the land under such instrument.

3. Such an instrument reserving a rent of less than 100*l.*, is sufficiently stamped with a 1*l.* 10*s.* stamp.

Queen's Bench.

The QUEEN v. Inhabitants of HOCKWORTHY.

settlement, the sessions quashed the order, subject to the opinion of this Court on the following case:—

A notice of appeal and of the grounds of appeal had been duly served by the appellant parish. The grounds of such appeal were as follows: namely. That *John Thorn* deceased, (the late husband of the said *E. T.*) was legally settled in the parish of Bampton in the said county of Devon, by renting of one Mr. *Robert Elsworthy* certain lands and hereditaments situate in the said parish of Bampton for a year, from Lady-day, 1830, at a rent of upwards of 10*l.* a year, and that he occupied the same for a year, and paid a year's rent for the same; and that the said *E. T.*, the widow of the said *J. T.*, is legally settled in the said parish of Bampton.

When the above notice had been read at the trial of this appeal, it was contended by the respondents, that looking at the terms of it, they had received no notice to prove the settlement in the appellant parish, and that the appellants were bound to prove the settlement in Bampton, to which alone the statement of their grounds of appeal was confined. The Court however called upon the respondents to support their order, by proving the settlement (as stated in their examination) in the appellant parish. The respondents objected to the right of the appellants, under the terms of their notice to cross-examine the witness on this part of the case. The Court held that they were entitled to cross-examine, and they did so. The respondents attempted to prove a settlement in the appellant parish by hiring and service which in the judgment of the Court they failed to substantiate. The appellants then attempted to establish a settlement of the pauper through her late husband, by reason of his renting a tenement (as stated in their notice) in the parish of Bampton, and tendered in evidence an instrument signed by the pauper's husband and one *Robert Elsworthy*, of which the following is a copy.

"Memorandum of agreement made the 24th day of March 1830, between *Robert Elsworthy* of Bampton in the county of Devon, &c. of the one part, and *John Thorn* of Chipstable &c., of the other part, witnesseth, that the said *R. E.* doth let unto the said *J. T.*, a dairy consisting of ten cows and two living calves, to be all in pail by the 1st of May, or 3*s.* 6*d.* per week to be allowed for the deficiency of each or either of the said cows after the 1st of May; and if any or either of the said cows should fail by loss of milk or misfortune, after seven days notice has been given, to be exchanged for another, or satisfaction made for such loss; also the kitchen, back-kitchen, dairy, two bed-rooms, (except as hereinafter excepted) also sufficient fire-charges, pigsties, and other appurtenants which have been usually let with the said dairy, together with the north part of the garden, and 120 perches properly manured and cultivated for potatoes, and 25 faggots of wood to be delivered in court for each cow, with liberty of cutting browze at the said *Robert Elsworthy*'s appointment, to be found a horse one day in a week when barrelling of butter, and one day a fortnight when not barrelling. The pigs to run in the east part of the orchard until the apples are necessary to be saved, and then in the Gorney until the apples are taken in, and to be kept well ringed to prevent their doing damage; and also to have certain pieces of ground called Great South Moor Cross Park, Gorney Middle Castle, and West Castle, and the first fortnight keep in the South Castle. Also the pasture of the home meadow after the hay is carried off, until the 1st day of

November, 1830, the pasture of the West Meadow until the 20th day of November, and the pasture of the Lower Meadow until the 25th day of December 1830, the said Lower meadow to be unstocked when very wet, and to help mow and make the hay in the said meadows free of expense, except being found in meat and drink; the hay to be put in one rick, and divided into three parts, two of the three parts to be for the use of the said cows, one of which two parts to remain unconsumed at Lady-day 1831, and to keep the windows properly glazed, and so to leave the same at the end of the term, except what glass the said *R. E.* or family breaks; in consideration of the said *J. T.* his executors, administrators, or assigns paying unto the said *R. E.* the sum of 75*l.*, the first quarter's rent to be paid on or before the 24th day of June, the second payment at Michaelmas, the third payment at Christmas, and the fourth payment at Lady-day, 1831, being the end of the term. Also the said *R. E.* reserves liberty of the fire place in the kitchen with a friend or his servants when required, and also to dress all meat and vegetables that might be wanted, and the chamber over the back kitchen, and liberty of his servant girl sleeping in one of their bed-rooms. And also the said *J. T.*, or his attendants, to dress all meat and vegetables when wanted, the servant girl to assist; also half the poultry and eggs, the hearth ashes to be at the disposal of the said *R. E.*; the cows to be put to bull so as to calve by the 25th of March, 1831, and if any or either of the said cows should not go to bull, to be at the disposal of the said *R. E.* the 2d February, 1831; the said *R. E.* to find all firing for his use in the kitchen, the cows to be kept on straw before they have calved during the winter, also to have half of the poultry and eggs, and liberty of running pigs with the said *J. T.*, who is to keep fence for his own pigs and to attend to all stock on the said farm in the absence of the said *R. E.*, the parting in the orchard to be kept at a joint expense; the said *J. T.* to work for 1*s.* and liquor when required, and to quit at the end of the year without any further notice, unless otherwise agreed on. In witness whereof &c."

The above agreement was stamped with a 1*l.* 10*s.* stamp, and the pauper's husband occupied under it the premises referred to therein for above a year, and paid to the amount of 75*l.* reserved by it. The respondents objected, 1. That the stamp was insufficient. 2. That the instrument purported to be a demise of incorporeal hereditaments, and should therefore have been under seal. The questions intended to be submitted to this Court are, 1. Whether looking at the terms of the notice of appeal, the Court of Quarter Sessions were right in requiring the respondents to prove a settlement in the appellant parish, and whether the appellants were entitled to cross-examine witnesses called for such purpose. If the Court should be of opinion that the sessions were right in that respect, the order of removal to be quashed. If the sessions were wrong in that respect, the order of removal is to be confirmed, unless this Court should be of opinion that the settlement in Bampton was proved in reference to the two following questions, and in that case the order of removal is to be quashed, (that is to say), whether the instrument before mentioned was properly stamped, so as to be admissible in evidence. 2. Whether a settlement was gained by occupying under that instrument the premises mentioned in it, and by paying the 75*l.* per annum reserved by it.

The case came on for argument in this term, but the Court sent back the

appellant parish, the respondents not having been informed
the grounds of appeal that such proof were required. It i
in all cases, even where no grounds at all of appeal are stat
ents, by transmitting the order of removal and the paupe
undertake to prove a settlement in the appellant parish. *
wick (*a*) is however, against this position.—[Lord *Denman*, C
the intention of the legislature was, that the appellants sh
of any defect whatever in their adversaries case, on which
rely.]—Secondly, a settlement was gained in Bampton. It i
as an incorporeal hereditament cannot pass except by deed,
which related to incorporeal hereditaments as well as land
void. Even if that were so, the sessions on a question of se
look at the actual occupation and payment of rent by the pau
tain the value of the several subjects of demise, *Rex* v. *Pick*
no incorporeal hereditament was demised. The subjects o
either goods and chattels, as the browse, *Smith* v. *Surman* (c
land. A demise of pasture is a demise of land itself, *Shep. T*
diner v. *Williamson* (*d*), where a distress was made for rent
from an incorporeal hereditament and partly from land, altho
no demise by deed, is not in point, because as the rent was
both subjects of demise, there was no ascertained sum for wh
could be made in respect of the land. In *Bird* v. *Higginson* (e
said, "Are there not cases where a rent being nominally r
two things, of which one was capable of having rent issuing out
other not, the rent has been held to issue wholly out of the
Farewell v. *Dickenson* (*f*) is an authority for this doctrine.
sufficient, whether the instrument be treated as an agreem
Clayton v. *Burtenshaw*, in which the 1*l.* 10*s.* stamp was held to
was the case of a deed, and the instrument was held to fall
of a deed not otherwise charged.

T. H. Terrell, contrà. A demise not under seal, and rel
incorporeal hereditaments, is wholly void, *Bird* v. *Higginson*

instrument was a "lease not otherwise charged" within 55 *Geo.* 3, c. 184, for it reserved rent for distinct subject matters, *Coster* v. *Cowling* (*a*).

Per Curiam (*b*).—Whatever might be the effect of the contract between the parties to it, the demise was not void for the purpose of settlement. The holding was good as regarded the land. So where freehold and copyhold are demised together without license from the lord, the demise is good for the freehold. The stamp too was sufficient.

Order of Sessions confirmed.

(*a*) 7 Bing. 456.

(*b*) Lord *Denman*, C. J., *Littledale*, *Williams*, and *Coleridge*, Js.

SIBLEY *v.* FISHER.

In an action by the indorsee against the indorser of a bill, where the indorsements were denied, but the making of the bill admitted, the plaintiff need not account for an alteration in its date.

ASSUMPSIT by the indorsee against the indorser of a bill of exchange, dated the 10th December, 1836. The four first pleas denied the indorsements. The fifth, the presentment. The sixth, the notice of dishonour to the defendant. The seventh, the consideration for the indorsement.

At the trial before Lord *Denman*, C. J., at the Middlesex sittings after Trinity Term, 1837, the bill when produced bore the appearance of having been altered from the 15th December to the 10th. It was contended, that the plaintiff was bound to account for the alteration. His lordship overruled the objection. Verdict for the plaintiff.

Jervis in the following term moved for a new trial. Every alteration appearing in an instrument is primâ facie improper, and the onus lies on the party setting up such an instrument, to prove the alteration to have been properly made, *Henman* v. *Dickenson* (*c*). Although there was no plea in this case denying the making of the bill, yet the judge at the trial was bound ex officio to reject the bill, the alterations in which had not been accounted for.

Cur. adv. vult.

Lord DENMAN, C. J. on a subsequent day in this term delivered judgment.—We think that as the making of the bill was admitted on the record, the plaintiff was not bound to account for the alteration.

Rule refused.

(*c*) 5 Bing. 183.

Queen's Bench.

MARSTON *v.* ROE, on the several demises of WILLIAM JOHN FOX and another.

IN THE EXCHEQUER CHAMBER.

Nov. 27.

1. The revocation of a will by the subsequent marriage of the testator, and the birth of a child, is founded on a rule of law, altogether independent of any question of intention of the testator, and consequently no evidence of the testator's intention that his will should not be revoked, is admissible to rebut the presumption of law in favor of such revocation.

2. In order to prevent the revocation of the will, and take the case out of the general rule, it is not sufficient that a provision is made for the wife only, but such provision must extend also to the children of the marriage.

3. *Semble*, that after-acquired property descending from the children, will not prevent the revocation.

4. If the testator be heir at law to *A.*, and *A.* agree to purchase an estate, and then die intestate and unmarried, the equitable interest in such estate immediately descends to the testator; and if the testator, while the equitable interest is in him, make a will containing a general devise of all his real estates, the equitable interest will pass to the devisee under his will, though the will be dated before the agreement to purchase is to be carried into execution; and the subsequent conveyance of the legal estate to the testator will give no real or beneficiary interest to his heir at law, but will make him a trustee for the devisee.

The descent of this legal estate on the child of the marriage forms no such provision for him as to prevent the revocation of the will.

5. In ejectment between a devisee under a will, made previous to marriage and the birth of a child, and the heir at law, the issue of such marriage, previous wills by the testator are admissible in evidence for the devisee.

6. Declarations by the testator, previous to marriage, on the subject of his intended wife's dower, are admissible in evidence for the heir at law.

7. Parol evidence is admissible to shew that a party to a written agreement to purchase entered into it as agent to another.

EJECTMENT for lands in Staffordshire. At the trial before *Alderson*, B. at the Gloucestershire spring assizes, 1836 (in which county the tri was had by suggestion), the plaintiff in error, who claimed under a will *John Fox*, dated 17th January, 1835, duly executed to pass real propert admitted the title of *William John Fox*, as heir at law.

He offered in evidence two previous wills of the testator,—one dated 9th March, 1834, by which the testator devised all his real property, subject an annuity of 40*l.* to *Ann Bakewell*, to his brother *Joseph Fox*.

The other was dated 1st December, 1835, by which he left certain lan and tenements to *Anne Bakewell* for life, remainder and all the residue of h real property to the plaintiff in error.

The admission of this evidence was objected to, but it was received the learned Judge; whereupon a bill of exceptions was tendered by the fendant in error.

The plaintiff in error having proved the death of *Joseph Fox*, the brot of the testator, in November, 1834, also offered in evidence certain lett from the testator, the first dated 19th January, 1835, the last 23d F bruary, 1835, which announced his marriage, two days before, with *Bakewell*, and among other expressions of attachment to the plaintiff error, contained the following,—"Dear William, no act of mine shall p judice the interest of relatives."

He also offered in evidence various declarations of the testator, one m about a month after his marriage, stating that he felt very unwell; that will was made; that it was as it should be, for it should never be alter that he did not wish his marrying *Ann Bakewell* to prejudice his friend *Wil Marston* (the plaintiff in error) at all: another, eight or ten days before death, that he had made his will, and would not alter it; that he had left chief part of his property to the plaintiff in error, and had taken care t the *Bakewells* should not have any part of his property.

The admission of these letters and declarations in evidence was objec to, but they were received by the learned Judge; whereupon a bill of ceptions was tendered by the defendant in error.

The defendant in error offered in evidence declarations of the testator r tive to his intended wife's dower (set out in the special verdict). Th were objected to, but received by the learned Judge; whereupon a bi exceptions was tendered by the plaintiff in error.

The defendant in error having proved the contract, lease and release,

other circumstances (set out in the special verdict) relative to some property at Marston Montgomery, in Derbyshire, also offered to prove, by parol evidence, that this property had been purchased by *Joseph Fox*, as agent for the testator.

This evidence, so offered by the defendant in error, being objected to, was rejected by the learned Judge; whereupon a bill of exceptions was tendered by the defendant in error.

The jury found a special verdict to the effect following:—On the 17th January, 1835, *John Fox* (deceased) made his last will in writing, duly executed to pass real estates, by which he devised several messuages, closes, and lands "unto and to the use of his friend *Ann Bakewell*, of Uttoxeter aforesaid, spinster, and her assigns, for and during the term of her natural life, or so long thereof as she shall remain sole and unmarried, subject nevertheless to impeachment for waste; and from and after the decease or marriage of the said *Ann Bakewell*, which shall first happen, he gave and devised the said messuage &c. to his relative *William Marston*." He then, after some devises and legacies, which he charged on his real property therein devised to *William Marston*, gave and bequeathed all his messuage, farms, lands, tenements, tithes, and hereditaments, and real estates, and parts and shares of such, not before disposed of, and whether freehold, copyhold, or customary, and whether in possession, reversion, remainder, contingency, or expectancy, with all rights &c. thereto belonging, to the said *William Marston*, and his heirs &c., for ever, subject as aforesaid, and to the payment of his debts; and he appointed *William Marston* and *John Hordern* his executors.

From the 25th March, 1834, down to the time when the testator executed the said will, he contemplated a marriage with *Ann Bakewell* therein named. On the 21st February, 1835, he married *Ann Bakewell*, and lived with her up to the time of his death. He had been, from the time of his marriage down to his death, in a bad state of health, and on the 11th day of May, 1835, he was taken ill, and died. At the time of his death he was seised in fee-simple of all the premises mentioned in the declaration. Ten weeks before his death he told *Elizabeth Stone* that his will was deposited in an oak chest, whereof he kept the key in his bed-room, and it was there found by her shortly after his death. On the 16th October, 1835, the wife of the said *John Fox* was delivered of the said *William John Fox*, one of the lessors of the plaintiff, who is the only son and heir at law of the testator. Of the lands of which the testator died seised, his widow would be entitled to dower unless she was deprived of such dower by the operation of his will (*a*), or by operation of law. The testator, on the 20th November, 1834, had agreed to purchase a house for 690*l*., for the purpose of residing in when married. In the draft conveyance sent to the testator for his perusal, was inserted a declaration that any wife testator might take, should not be entitled to dower. The testator requested that such clause should be struck out. Upon its being explained to him, that, as he was on the point of marriage, if after he married he wished to resell the property, he could not do so without the consent of his wife; he said he was perfectly aware of that; that he did not intend to debar his wife of dower. On the 30th of September, 1829, *Joseph Fox*, the brother of *John Fox*, entered into a written contract for the purchase of some property at Marston Montgomery, in the county of Derby, at the

(*a*) See 3 & 4 Will. 4, c. 105.

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sum of 463*l.* 14*s.* 6*d.*, with certain trustees under the will of *John Etches*, deceased. On the 28th day of March following, *John Fox* was let into possession of the said last-mentioned premises, but the titles not being then complete, it was agreed that he should receive the rents and profits from that period, and should pay interest to the said trustees on the amount of the purchase-money, until the purchase was completed. After this agreement, *John Fox* in like manner, as the purchaser of the other parts of the same estate, which was sold in lots, was let into possession of the said property so contracted for by *Joseph Fox*, and let the same to *John Deaville*, who held the same as tenant, and paid rent half-yearly to *John Fox* from the said 25th day of March, 1836, up to the time of his decease, some of which payments were made in the presence of his brother *Joseph*. No other contract than the one mentioned to have been entered into by *Joseph Fox* with the trustees was made for the last-mentioned property. On the 17th day of November, 1834, *Joseph Fox* died, unmarried and intestate, seised of considerable real estates in fee simple in possession, which thereupon descended to *John Fox*, as his only brother and heir at law, and *John Fox* was the sole next of kin of *Joseph Fox*, and was entitled to administration of the personal estate of which he died possessed. By deeds of lease and release, bearing date the 6th and 7th of March, 1835, the property at Marston Montgomery, was conveyed by the said surviving trustees under *John Etches'* will to *John Fox*, in consideration of 463*l.* 14*s.* 6*d.*, who thereupon paid the said purchase-money and interest upon the same, from the 25th day of March, 1830. In the month of August, 1835, *John Deaville* paid half a year's rent, due for the same premises on the 25th day of March preceding, to *John Holdern*, who was one of the executors of *John Fox*. The value of the real estate left by *John Fox* amounted to about 49,000*l.*

An action of trover for the title-deeds of the same estate, brought in the Court of Exchequer between the same parties, came on for trial at the same assizes, upon which the same question arose. Judgment was given for the defendant in error, in the ejectment in the Queen's Bench, without argument; and it was consented that the writ of error on the ejectment should be argued before all the Judges, and that both cases should abide their decision thereon.

The case was argued on June 13th, November 1st, and November 27th, 1837, before *Tindal*, C. J., Lord *Abinger*, C. B., *Park*, J., *Littledale*, J., *Vaughan*, J., *Parke*, B., *Bolland*, B., *Bosanquet*, J., *Alderson*, B., *Patteson*, J., *Gurney*, B., *Williams*, J., *Coleridge*, and *Coltman*, J., by

Sir *J. Campbell*, A. G. for the plaintiff in error.

Sir *W. W. Follett*, for the defendant in error (*a*).

(*a*) It has not been thought necessary to introduce the arguments of counsel and authorities relied on. The Act for the amendment of the Laws relating to Wills, 7 Will. 4 and 1 Vict. c. 26, ss. 18, 19, having provided, with respect to wills made after 1st January, 1838, that every will made by a man or woman shall be revoked by his or her marriage, and that no will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances. See the above statute as to the mode of revoking or altering wills.

TINDAL, C. J. in the ensuing Hilary term (*a*), delivered the judgment of the Court. This case has been brought by three writs of error from the Court of Queen's Bench, where judgment has been given for the lessor of the plaintiff, on a special verdict. The plaintiff below brought an ejectment to recover certain lands in Staffordshire, the trial of which action was removed, by a suggestion on the record, to Gloucester, where it took place before my brother *Alderson*. Upon the trial, cross bills of exceptions were tendered to and allowed by the learned Judge; that on the part of the lessor of the plaintiff, containing exceptions, as well against the admission of evidence given by the defendant below, as also for the rejection of evidence which he had offered; that on the part of the defendant below, for the rejection of evidence only. One of the writs of error has been sued out by the defendant below to bring up the judgment, which was given without argument on the special verdict; and each party has brought up his own bill of exceptions by a writ of error sued out by himself. Another action, namely, an action of trover, for the title-deeds of the same estate, had been brought by the lessor of the plaintiff against the defendant below, in the Court of Exchequer, and came on for trial before the same Judge at the same assizes; and as the very same question arose in both actions, a course precisely similar was pursued in both, and for the purpose of avoiding as well unnecessary expense to the parties, as loss of time to the respective Courts of Error, it was thought convenient that the argument of the writs of error in the first-mentioned cause should take place in the presence of all the Judges of the three Courts of Westminster Hall; the parties having consented that both cases should abide the decision of the present, and this case has accordingly been argued in the presence of all the Judges of England, with the exception of Lord *Denman*. On the part of the plaintiff in error (the defendant below), it was contended, that admitting the general rule to be established that marriage and the birth of a child operated as the revocation of a will made before the marriage, where the wife and child were left without provision, yet such revocation was grounded on an implied intention of the testator to revoke his will under the new state of circumstances which had taken place since the will was made, and upon such implied intention only; and, consequently, that any evidence was admissible on the part of the devisee, which shewed a contrary intention, in order to rebut such presumption.

On the part of the defendant in error it was contended, that such revocation, under the circumstances above supposed, is the consequence of a rule of law or of a condition tacitly annexed by law to the execution of a will, that, when the state of circumstances under which the will is made becomes so materially or rather entirely altered by a subsequent marriage and the birth of a child, the will should become void; and that the operation of this rule of law was altogether independent of any intention on the part of the testator.

The broad question, therefore, which has been argued between the parties has been, whether evidence of the testator's intention that this will should not be revoked, is admissible to rebut the presumption of law that such revocation should take place? And we concur in the opinion, that the revocation of the will takes place in consequence of a rule or principle of law

(*a*) January 26.

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independently altogether of any question of intention of the party himself, and consequently that no such evidence is admissible.

The plaintiff in error, in support of the proposition for which he contends, has relied on the authority of various decisions of cases as well in the Ecclesiastical Courts as in the Courts of Common Law. With respect to the former we cannot but entertain considerable doubt, whether their authority can be held to apply to the present question. For whilst we are entirely convinced of the importance of a uniformity of decision between the courts of ecclesiastical and of common law jurisdiction, where the same state of facts is under investigation or the same principle of law is under discussion in each; and entertaining as we do at the same time, the highest respect for the learning and ability of those by whom justice is administered in the Ecclesiastical Courts, we cannot forget that in the question now before us we have to deal with the provisions of a statute with which the questions ordinarily coming before them are wholly unincumbered. The question now before us relates to the revocation or non-revocation of a will *devising real property*. It is a question whether such revocation shall be allowed to depend upon evidence of intention, that is, upon evidence of which parol declarations of the testator may confessedly form a part; whilst the Statute of Frauds has anxiously and carefully excluded evidence of that nature, with respect both to the original making and the revoking of wills of land. The Ecclesiastical Courts, on the other hand, are concerned in the granting probate of wills and testamentary papers *relating to personalty only*, in which cases no statutory enactment has excluded parol evidence of the intention of the testator as to what shall or shall not be a testamentary paper, or what shall or shall not amount to a revocation or republication of a will. On the contrary, the evidence bearing on the points is generally mixed up with declarations of the party, and frequently consists of such declarations alone. The decisions therefore in the Ecclesiastical Courts, referred to by the counsel for the plaintiff in error, may be sound decisions with respect to the subject-matter to which they relate, and may yet furnish no authority on the case now in judgment before us. And if that question is to be decided, as we think it is, by the weight of the authorities to be found in the Courts of Common Law, the balance preponderates greatly in favour of the proposition that no evidence of intention is to be admitted to rebut the presumption of law, that a will is revoked by subsequent marriage and the birth of a child. The cases relied on principally by the plaintiff in error (the defendants below) are those of *Brady* v. *Cubitt* (*a*), and *Kenebel* v. *Scrafton* (*b*), those which are appealed to by the defendant in error (the lessor of the plaintiff) are *Doe* v. *Lancashire* (*c*), and *Goodtitle* v. *Otway* (*d*).

Now with respect to the case of *Brady* v. *Cubitt* (*a*), it must be admitted, that the opinion of Lord *Mansfield* is expressed in terms the most explicit and unreserved, "that the presumption of revocation from marriage and the birth of children, like all other presumptions, may be rebutted by any sort of evidence." But it must be at the same time observed that the decision of that case rests also upon other grounds, which are altogether satisfactory and free from objection: viz. first, that the disposition made by the will was of *part only* not *the whole* of the estate; and secondly, that the instrument

(*a*) 1 Doug. 31.
(*b*) 2 East, 530.
(*c*) 5 T. R. 49.
(*d*) 2 H. Bl. 516.

executed after the death of the child operated as a *republication* of the devise contained in the will.

And as to the case of *Kenebel* v. *Scrafton* (*a*), it affords no authority whatever for the position that such implied revocations can be rebutted by parol evidence of a contrary intention existing in the testator's mind; because in that case the objects of the marriage were contemplated and provided for by the will, so that there was no implied revocation whatever of the *will;* and next, because the question as to the admissibility of such evidence is expressly declared by Lord *Ellenborough*, in giving the judgment of the Court, to be left entirely untouched by the decision of that case.

And looking, on the other hand, at the case relied upon on the part of the lessor of the plaintiff we agree entirely with Lord *Kenyon* as to the ground upon which the doctrine of implied revocation, under the circumstances now before us, ought to be rested. That very learned judge, in giving his judgment in the case of *Doe* v. *Lancashire* (*b*), treats it as a principle of law, of which he suggests the foundation to be a tacit condition annexed to the will itself, when made, that it should not take effect if there should be a total change in the situation of the testator's family: and this foundation of the rule is confirmed by the judgment of Lord *Ellenborough* in the case above referred to (*c*), where he says this ground is to be preferred "to any presumed alteration of intention, which alteration in intention should seem in legal reasoning not very material, unless it be sufficient to found a presumption in fact, that an actual revocation has followed therefrom." The case again of *Goodtitle* v. *Otway* (*d*), although not the same in circumstances, yet establishes the very same principle as that contended for by the defendant in error. That case did not indeed relate to the revocation of a will by a subsequent marriage and the birth of a child; but to the revocation of a will by a subsequent conveyance of lease and release, executed for a limited purpose only: but the same principle was laid down, that parol evidence shall not be admitted to shew that the testator meant his will to remain in force against the revocation implied by law from the execution of such subsequent conveyance; the Lord Chief Justice *Eyre* stating his opinion to be, that in cases of revocation by operation of law, "the law pronounces, upon the ground of a *presumptio juris et de jure*, that the party did intend to revoke, and that *presumptio juris* is so violent that it does not admit of circumstances to be set up in evidence to repel it: and this makes it difficult," he says, "to understand the case in Douglas (*Brady* v. *Cubitt*,) supposing that to be a case of revocation by operation of law, and not within the Statute of Frauds." And we think this opinion at which we have arrived not only supported by the authority of the decided cases, but the only one which is consistent with the provisions of the Statute of Frauds. For if, against the intention to revoke, which is presumed by law, parol evidence of a contrary intention could be admitted, such as evidence of conduct of the testator, leading to the inference that he meant the will to stand, or of declarations to that effect, then it would be but reasonable to allow such evidence to be met and encountered by evidence of conduct of the testator, leading to a different inference and of declarations contradictory to the former. And again, the admission of such evidence leads to this further difficulty, that if the testator changes his first intention and

(*a*) 2 East, 530.
(*b*) 5 T. R. 49.
(*c*) *Kenebel* v. *Scrafton*, 2 East, 530.
(*d*) 2 H. Bl. 516.

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Fox his elder brother and sole next of kin and heir at law, and the person entitled to take out administration to his personal estate. *John Fox*, therefore, at any time after his brother's death, had the right to file a bill in equity for the specific performance of the contract, and was therefore seised of the equitable estate at the time of making his will. Holding, therefore, as we do, that the beneficiary interest in this estate passed under the devise, we consider the descent of the legal estate upon the child of the marriage to have formed no provision for him, but that he was left wholly unprovided for, as he neither took any thing under the will, nor any thing (if that would have been sufficient) by descent from the father.

We therefore think the will revoked, and that the lessor of the plaintiff is entitled to have the judgment affirmed which has been already given for him on the special verdict; and this makes it unnecessary for us to give any judgment upon the bill of exceptions tendered by the lessor of the plaintiff, for as he is entitled to our judgment on the facts found by the jury, that bill of exceptions may for the present be considered as wholly immaterial, or as if it never had been tendered at the trial; though at the same time we have no hesitation in declaring our opinion to be, that the learned judge was right in admitting the evidence therein mentioned, but wrong in rejecting the evidence which was offered to prove that *Joseph Fox* entered into the agreement of purchase stated in the bill of exceptions as the agent of *John Fox*.

Upon the whole, therefore, we are of opinion, that the judgment of the Queen's Bench must be affirmed.

Judgment for the defendant in error(*a*).

(*a*) Assuming that evidence of an intention not to revoke were admissible: *quære*, whether under the circumstances there were any grounds whatever from which it could be inferred that such intention had ever existed in the present case: there being nothing to shew that the testator had ever been informed, as in *Doe* v. *Lancashire*, that his wife was *enceinte*, and his declarations expressing wishes that the will should stand, in order that his own relatives, and not those of his wife, should possess his property, seeming clearly to shew that he did not contemplate leaving any issue of his own.

A

DIGEST

OF THE

CASES REPORTED IN THIS VOLUME.

CONTAINING

THE DECISIONS OF THE COURT OF KING'S BENCH, AND ON WRITS OF ERROR FROM THAT COURT TO THE EXCHEQUER CHAMBER, AND IN THE BAIL COURT,

FROM

HILARY TERM, 7 WILL. IV. 1837, TO MICHAELMAS TERM, 1 VICT. 1837, INCLUSIVE.

ABATEMENT.—See AMENDMENT, 2.

AFFIDAVIT.

I. *To hold to bail.*

See also PRACTICE, 4.

1. An affidavit of debt, not intituled in any Court, jurat of which stated it to be sworn before a commissioner of the Courts of Queen's Bench, Common Pleas, and Exchequer, is sufficient. *Ferguson* v. *Thomson*, 605.

2. An affidavit of debt, which describes the deponent as "*acting*" as managing clerk to the plaintiff's attorney, is bad. *Graves* v. *Browning*, 338.

3. An affidavit of debt for money paid to the use of the defendant, according to the terms of a deed which is set out, but not stating that it was "at his request," is good. *Boddington* v. *Woodley*, 581.

4. An affidavit of debt for work done, "as the agent of the defendant and on his retainer," is sufficient, though it does not state it to have been done "at his request." *Id.*

5. An affidavit of debt set out an indenture of mortgage to secure a sum due, as well as to secure future advances, and averred that a sum was afterwards due to the plaintiff for, &c., but without stating that it was due "from the defendant," or that the money was become due in pursuance of the deed:—held, that according to the terms of the indenture the affidavit was sufficient. *Id.*

6. The indenture being also to secure interest on the whole amount due, the affidavit averred that part of the sum due was for interest computed from, &c.:—held, that the affidavit was good in this respect. *Id.*

7. An argumentative conclusion to the affidavit—"and so the deponent says that the defendant is justly and truly indebted," is immaterial, if there is a previous good averment of the debt. *Id.*

8. An affidavit of debt on a bill of exchange at three days' sight, stating that more than three days had elapsed since the defendant had received sight thereof, but not saying the day when he had had sight, is good. *Maynard* v. *Reynolds*, 394.

9. An affidavit of debt stating the defendant was indebted in the sum of 500*l.* "for principal money due on a bill of exchange," but not stating the amount of the bill, is bad. *Robins* v. *Grant*, 373.

10. An affidavit of debt stating a certain sum to be due by the defendant to the deponent, "on an account stated between them," is bad. *Hooper* v. *Vestris*, 380.

11. The following affidavit of debt, "*J. H.*, of, &c. manager of the Ripon branch of the Yorkshire district bank, maketh oath and saith, that *A. N.* is justly indebted unto *J. S.*, of, &c., *as one of the registered public officers of the said Yorkshire district bank*, for money lent by this deponent, as such manager as aforesaid, to the said *A. N.*," is irregular in not shewing the bank to be within the provisions of the act (7 Geo. 4, c. 46, s. 9,) for the regulation of copartnership banks, but is not a nullity. *Spencer* v. *Newton*, 232.

12. Where a defendant taken under a capias, indorsed for 179*l.*, gave a bail-bond for that amount, and the affidavit of debt was for 174*l.* only, the Court ordered the bail-bond to be cancelled, and a common appearance to be entered. *Cook* v. *Cooper*, 683.

II. *Other Affidavits.*

See also EJECTMENT, 32, 33. EVIDENCE, 4.

13. An affidavit in support of a motion by which a person seeks to be made party to a cause, sworn before a commissioner who is clerk of his own attorney, is good. *Doe* d. *Grant* v. *Roe*, 68.

14. An affidavit sworn before the attorney of a party, but who is not attorney *on the record*, is bad. *Kidd* v. *Davis*, 189.

15. It must appear clearly by affidavit, on such an objection being made, that the attorney was attorney for the party *at the time* the affidavit was sworn. *Id.*

16. Where there are several defendants, the names of all should be set out in the title of an affidavit made in the cause. *Theobald* v. *Brame and others*, 219.

17. An affidavit in support of an application to stay proceedings on a bail-bond, may be intituled in the original cause. *Craig and others* v. *Evans*, 386.

18. An affidavit to support a rule to set aside a warrant of attorney, intituled as in a cause, with the words "plaintiff" and "defendant" added to the names of the parties, is good. *Thompson* v. *Vaux and another*, 386.

19. A description of the deponent in an affidavit as of the Strand, without giving the number, is sufficient. *Nowell* v. *Hart*, 394.

20. An affidavit made in a cause by the defendant is good, though it does not give him any addition. *Themans* v. *Fenn*, 217.

21. On shewing cause against a rule, the Court allowed an affidavit which omitted the deponent's addition, to be amended and resworn. *Boskay* v. *Lister*, 216.

22. An affidavit describing the deponent as late of a place held bad, it not appearing that he had no fixed place of residence. *Ex parte Edmonds*, 369.

23. A joint affidavit of two persons, which is defective as to one, may be read as to the part sworn by the other. *Id.*

24. An attachment cannot be granted for disobedience to a Rule of Court, on an affidavit calling it an "order" of Court. *In the matter of Turner*, 575.

25. An affidavit of merits made by the defendant, stating he had a good defence on the merits, "as he was advised and believed," is good. *Crosley* v. *Innes*, 192.

26. An affidavit of merits made by the defendant's attorney, must state distinctly that the deponent is attorney for the defendant. *Bonnefor* v. *Russell*, 214.

27. An affidavit of merits made by the defendant's attorney's clerk, on a rule to set aside a judgment, must state that he has had the management of the cause. *Rowbotham* v. *Dupree*, 215.

28. If it does not, the Court will not, on hearing the rule, allow the affidavit to be amended and resworn. *Id.*

AGENT.

See also BANKRUPT, 2. BILL OF LADING. EVIDENCE, 4. LANDLORD AND TENANT, 6.

1. Where a broker on a sale of goods received the purchase-money, and delivered an invoice in his own name:—Held, in an action against him for their non delivery, that the form of the invoice precluded him from setting up a defence that he was a mere agent, and that his principal was known to the plaintiff. *Jones* v. *Littledale*, 240.

2. Parol evidence is admissible to shew that a party to a written agreement to purchase, entered into it as agent to another. *Marston* v. *Roe*, d. *Fox and another*, (In Error.) 712.

AMENDMENT.

1. After the jury had been sworn in a cause, and the case on both sides closed, it was discovered that the issue on the Nisi Prius record deviated from the form given in the rules of H.T. 4 Will. 4, in not containing the date of the writ issued in commencing the action:—Held, that the judge who tried the cause had authority to supply the omission. *Cox* v. *Painter*, 228.

2. In an action on a banker's accountable receipt the Court refused to set aside a plea in abatement, or to allow the plaintiffs to amend the writ and proceedings by inserting the name of a person who ought to have been made a co-defendant, although the Statute of Limitations would have barred any fresh action. *Roberts and another* v. *Bate and another*, 307.

APPEAL.—See SESSIONS.

APPRENTICE.—See POOR, 7, 8, 9, 10.

ARBITRATION.

See also ATTACHMENT, 3. COSTS, 5. PRACTICE, 31.

1. Where all matters in difference as well as a cause are referred by order of Nisi Prius, a motion to set aside the award need not be made within the first four days of the term next after its publication, although there are not actually any matters in difference out of the cause. *Moore* v. *Buttin*, 638.

2. A cause being pending, it was agreed to refer it to arbitration, which was done by articles of agreement, and not by order of a judge:—Held, that an award made under this reference was made under the statute 9 & 10 Will. 3, c. 15, and that a motion to set it aside on the ground of fraud in the appointment of the umpire, should be made in the term next after the award was made and published. *Reynell* v. *Askew*, 366.

3. It is no excuse for not making the motion within that time, that the submission had not then been made a rule of Court. *Id.*

4. A motion subsequently made is too late, even though the facts on which the motion is made did not come to the knowledge of the party within the time. *Id.*

5. A person moving to set aside an award, which is not made under the statute 9 & 10 Will. 3, c. 15, after the time for moving for a new trial has expired, must shew clearly to the Court the reason why the application is made so late. *Id.*

6. Where, by order of Nisi Prius, a verdict was taken for 10*l.* on one of several issues, subject to the award of an arbitrator, to whom the cause and all matters in difference were referred; and the arbitrator had ordered verdicts to be entered on three other issues also, for 249*l.* 3*s.*, and 1*s.*, and 1*s.*, respectively, the award, which contained no distinct order to pay, was set aside. *Hayward* v. *Phillips*, 1.

7. A motion to set aside the award under such a reference may be made at any time before the end of the term next after the publication of the award. *Id.*

8. It is no objection to a rule for that purpose, that it is drawn up upon reading the affidavit and paper-writing annexed, if the affidavit refer to such paper-writing as a true copy of the award. *Id.*

9. The attendance of the attorney for the party against whom an award is made at the taxation of costs, without notice of objection to the award, and subsequent applications for time to pay its amount, are no waiver of the right to move to set it aside. *Id.*

10. If there are several issues in an action which is referred to an arbitrator, it is sufficient that the

arbitrator by his award shews how he means the decision on each issue to be made, without specifically awarding on each. *Hunt* v. *Hunt*, 62.

11. Three actions of assumpsit were referred, in which there were issues on pleas of non-assumpsit, set-off, and non-joinder; an award merely stating how much was due to the plaintiff in each, without awarding on the issues, is bad. *Id.*

12. If a cause is referred to an arbitrator, the costs of which are to abide the event, he cannot award a stet processus in the action. *Id.*

13. By a submission it was agreed to refer an action and some cross claims to arbitration, the costs of the suit and of the reference to be paid by the party against whom the award was made. The arbitrator awarded, that at the time of the reference there was due by the defendant to the plaintiff a certain sum, which he directed to be paid; he also directed that the defendant should pay a certain sum for costs, on payment of which each party should execute a release of the matters referred: – Held, that the arbitrator had no power to make the award as to the costs, but that the award was not therefore bad, though the payment of the costs was made a condition precedent to the defendant obtaining his release. *Kendrick* v. *Davis*, 376.

14. To a declaration with four counts in indebitatus assumpsit, the defendant pleaded generally, 1. Non assumpsit; 2. A set-off. The cause and all matters in difference having been referred by order of Nisi Prius, the costs of the cause to abide the event of the award, the arbitrator awarded that on both the issues, so far as the same applied to three of the counts, the verdict should be entered for the plaintiff, and as to the remaining count for the defendant; and he assessed the plaintiff's damages on the issues found for him at 19*l.* 5*s.* 1*d.*:—Held, that as the set-off was pleaded generally to the aggregate demands of the plaintiff, it was not a divisible plea, and that the arbitrator was wrong, therefore, in finding for the defendant on a single count, because the set-off equalled the plaintiff's demand on that particular count; but that as the mistake was in favour of the defendant, he could not avail himself of it on a rule to set aside the award, nor could the Court amend the award so as to deprive the defendant of costs on the issue so found in his favour; and the plaintiff agreeing to pay such costs, the rule was discharged. *Moore* v. *Butlin*, 638.

15. On a rule for an attachment for non-performance of an award made under a submission, neither the submission which has been made a rule of Court, nor any thing dehors the face of the award, can be looked at. *Macey* v. *Macey*, 371.

16. A cause was referred to an arbitrator by order of Nisi Prius, and before he made his award the defendant, in whose favour the award was, died; leave was given the next term to enter up judgment as of the term in which he died. *Lewis* v. *Winter*, 47.

ARREST.

See also PRACTICE, 22, 23, 24.

1. A party to a cause having notice that a motion will be made in one of the superior courts, is not privileged from arrest during his attendance for the purpose of watching the proceedings relative to that motion. *Spencer* v. *Newton*, 122.

2. A party privileged during his attendance before an arbitrator has not, after the proceedings are at an end, an extension of privilege because of his inability through want of money to return home. *Spencer* v. *Newton*, 122.

3. *Semble.* A party is privileged while incapacitated by illness from returning home. *Id.*

4. On making an arrest, a copy of the capias must immediately be delivered to the defendant. *Shearman* v. *Macnight*, 189.

5. If it is not, the Court will discharge the defendant on motion. *Id.*

6. An incorrect copy of the capias having been served on the defendant at the time of the arrest, it is for the plaintiff to prove, on shewing cause against a rule to discharge the defendant out of custody, that a true copy was served on the defendant. *Hodd* v. *Langbridge*, 379.

7. Where the copy of the capias served on a defendant at the time of his arrest, varies from the form given by the Uniformity of Process Act, the bail-bond must be delivered up to be cancelled, although the variance is immaterial. *Hulme* v. *Ashe*, 381.

8. In making an arrest on a ca. sa. if the officer improperly breaks open the outer door, the Court will discharge the defendant out of custody. *Hodgson* v. *Towning*, 53.

ASSUMPSIT.

See also MASTER AND SERVANT, 2. PLEADING, 3, 15.

1. Assumpsit may be maintained against a corporation, whether with or without a head, on an executed parol contract in respect of matters of ordinary necessity and inconsiderable value. *Beverley* v. *The Lincoln Gas and Coke Company*, 519.

2. Therefore a gas and coke company, being a corporation without a head, is liable in assumpsit for six gas-meters sold to them for 15*l.* *Id.*

3. Where assumpsit may be maintained at all against such a corporation, and goods sold conditionally on sale or return are not returned within a reasonable time, it is not necessary to declare specially, but the corporation is liable in common indebitatus assumpsit, in the same manner as any individual would be under the same circumstances. *Id.*

4. Forbearance for a given time, according to agreement, by the assignee of a bond, to sue the obligors, is a good consideration for their promise to pay him at the expiration of that time, or give him a warrant of attorney for the amount. *Morton* v. *Burn and another*, 508.

ATTACHMENT.

See also AFFIDAVIT, 24. ARBITRATION, 15. PRACTICE, 36. SHERIFF, 4.

1. A rule of Court having ordered an attorney to deliver a signed bill of costs to the present attornies of his client instead of the client himself, an attachment cannot be granted for disobedience to the rule on a demand made under a power of attorney executed by the client. *Ex parte Smith*, 588.

2. *Quære*, whether the attornies could have executed a power of attorney to make a valid demand. *Id.*

3. If three separate demands are made for three sums ordered to be paid by an award, one of which is improperly awarded, the party may yet have an attachment for the two others. *Kendrick* v. *Davis*, 587.

4. An award ordered the defendant to pay to the arbitrator the costs of the award, and if the plaintiff paid them, it ordered the defendant to repay them. On making a demand for these costs, in order to entitle the plaintiff to move for an attachment, notice should be given to the defendant that the plaintiff had paid them. *Kendrick* v. *Davis*, 587.

5. An attachment cannot be granted for non-payment of a sum pursuant to an award, if, on a demand made, the party offers to pay, on the costs, which were to follow the result of the award, being taxed. *Id.*

6. On moving for an attachment for non-payment of costs, pursuant to a rule of Court, it must be sworn that a copy of the rule was left with the party, and it is not sufficient to shew that he had knowledge of the rule. *Dalton* v. *Tucker*, 199.

7. A rule of Court directed a sum of money to be paid to the defendant or his attornies; the affidavit of one of the defendant's attornies stated a demand and refusal, and that the money had not been paid to him, and that he believed it was still unpaid:—Held, that this affidavit was sufficient to grant an attachment without an affidavit from the other partner. *Themans* v. *Fenn*, 217.

8. The Court will issue an attachment, although the party cannot be arrested on it, being at the time under examination under a fiat in bankruptcy. *Reed* v. *Spiers*, 61.

ATTORNEY.

I. *Examination and Admission.*

See also RULE OF COURT, 3.

1. An attorney having died, seventeen days elapsed before his articled clerk was assigned over to another attorney, to whom the clerk made up the time at the end of the five years:—Held, that he might be examined for admission as an attorney. *Ex parte Tomkins*, 569.

2. An articled clerk to an attorney who was prevented by illness from serving the last nine days of his time, which nine days he made up after his recovery, allowed to be examined for admission. *Ex parte Vaughan*, 46.

3. Order made for the examination of a person as an attorney where he had been absent with leave from his master's service for three months, which time he had afterwards made up. *Ex parte Peterson*, 196.

4. A person may be examined as an attorney, where, through the fault of his master, his articles of clerkship have not been properly enrolled. *Ex parte Nash*, 194.

5. A person may be examined for admission as an attorney, though an assignment of his articles of clerkship has not been registered within the proper time. *Ex parte Bates*, 350; *Ex parte Abrahams*, 350.

6. A Sunday will reckon as one of the three days which the rule of H.T. 6 Will. 4, s. 5, requires notices of admission of attornies to be left before the term. *Ex parte Bumps and others*, 350.

7. Held, that no further indulgence could be given for non-compliance with the rules of H.T. 6 Will. 4, as to the notices requisite to be given previous to the admission of attornies, on the ground of ignorance of those rules. *Ex parte Crewse and others*, 346.

8. Where a notice for admission as an attorney, as required by the rule of H.T. 6 Will
late through the default of a Londo
allowed the notice to be deemed
Lovegrove and another, 347.

9. Where a notice for admissio
was given too late, owing to infor
the office of the Incorporated Law
refused to allow the notice to be d
parte Martin, 347.

10. A person who cannot have
quired by the examiners of attorni
required, owing to the period of h
piring until a few days later, may y
the same term. *Ex parte Cooper*, 3

11. A person who cannot have
quired by the examiners of attorni
required, owing to the fault of the L
yet be examined in the same term.
349.

12. Proper notice having been gi
of a person as an attorney in a term
quently found he could not be pres
tion, leave was given him to give a
the commencement of the term, fo
following term. *Ex parte Senior*, 4

13. A person who was prevented
being admitted as an attorney in
which he had given notice, was allow
of Michaelmas term to give notices
on the last day of Hilary term. *E*
570.

14. A person who has obtained an
time for admission as an attorney,
ill-health, may be allowed a further
illness has put him to such expens
able to pay for his admission. *Ex p*

15. Where a person who had ob
miner's certificate for his admission
Trinity term, did not apply to the
sion in that term, thinking that he wa
admitted in Michaelmas term, the C
admission in Michaelmas term, but
to give fresh notices for the last day
Ex parte Southern, 570.

II. *Re-admission.*

16. A judge at chambers in vacat
an application for the re-admission
Ex parte Collins, 73.

17. *Semble*, that the copy of the a
by the rule of H.T. 6 Will. 4, s. 6,
the chief justice's clerk previous to t
of an attorney, must positively be
term. *Id.*

18. A person who was not aware
for the re-admission of attornies, all
affidavit later than is required by the
Black, 73.

19. Where the copy of the affidavi
given to the clerk of the chief justic
advertently omitted, the Court allowe
nunc pro tunc. *Ex parte Willis*, 571

20. A person allowed to be re-adr
torney, although he had omitted fro
give the notice at the King's Bench o
by the old rule. *Ex parte Busk*, 348.

21. An attorney who had been allowed to be re-admitted, but who had not acted on it for above a year on account of illness, re-admitted without giving the usual notice. *Ex parte French*, 71.

22. An attorney re-admitted in 1823 did not take out his certificate till 1826:—Held, that though he did not practise in the meantime, his re-admission was void, and the Court ordered securities given to him for work done in 1826, after he had taken out his certificate, to be cancelled. *Wilton* v. *Chambers*, 701.

III. *Summary Applications against.*

23. Where a client had a claim on his attorney for a sum of money received by him in a cause:—Held, that the client's remedy by action being barred by the Statute of Limitations was not a reason to prevent the Court exercising its summary jurisdiction. *Ex parte Sharpe*, 354.

24. An attorney was employed to prepare some mortgage deeds, and afterwards received the money raised by the mortgage:—Held, that he might be called on summarily to account for the money. *Ex parte Cripwell*, 356.

25. An attorney cannot be called on summarily to make good the value of an annuity, which he has lost through his neglect. *Ex parte Anderdon*, 608.

26. A country attorney employed his London agent to receive some money under a power of attorney from his client:—Held, that the latter could not compel the London agent, by means of a summary application, to pay him over the money. *Ex parte Baker*, 591.

27. The Court cannot compel an attorney who holds a power of attorney from an attorney who has absconded, to assign over some articles of clerkship to the attorney, or to deliver up a bond given for the payment of the premium agreed for, but will order the articles to be delivered up to be cancelled. *Ex parte Woodward*, 574.

28. A charge was preferred before a grand jury for obtaining a bond under false pretences, and the bill was ignored. After this the attorney for the prosecution obtained the bond from the constable, who had it to produce before the grand jury, on giving him an indemnity. The Court refused to make a rule absolute which called on the attorney to deliver it up to the obligee. *Ex parte Morris*, 59.

IV. *Other Matters.*

See also ATTACHMENT, 1, 2. COSTS, 8. PLEADING, 9. PRACTICE, 2, 12, 19, 24, 35.

29. The statute 37 Geo. 3, c. 90, s. 31, rendering null and void the admission of an attorney who neglects to renew his certificate, does not apply to County Courts, and render an attorney who has once been duly admitted, but has not renewed his certificate, liable to the penalty of 12 Geo. 2, c. 13, s. 7, for practising in such Courts without admission. *Hodgkinson* v. *Mayer*, 15.

30. Leave granted to enter, nunc pro tunc, in the Master's book, the certificate of an attorney which had been accidentally omitted. *Ex parte Graddon*, 609.

31. A clerk having been articled to an attorney who died, the Court referred it to the master to ascertain how much of the premium paid should be returned by a surviving partner of the attorney. *Ex parte Bennett*, 210.

32. *Quære*, whether it is necessary that the signed bill delivered by an attorney should specify the Court in which the business has been done. *Lane* v. *Glennie*, 479.

33. An attorney who places a writ for execution in the hands of an officer which the attorney knows that the officer intends to execute in a particular place, afterwards proved to be out of the officer's jurisdiction, is not therefore liable for the act of the officer, unless the attorney, at the time the officer communicates his intention, knew that the place was out of the jurisdiction. *Sowell* v. *Champion and others*, 667.

34. *Semble*, that if he did know it, his acquiescence in the illegal act of the officer will make him a joint trespasser. *Id.*

35. When an attorney applies to be struck off the roll, he should state his reason for so doing. *Ex parte Missing*, 73.

BAIL.

See also AFFIDAVIT, 12. PRACTICE, 29. SHERIFF, 4.

1. In the Court of King's Bench one day's notice of justification of bail at chambers is sufficient if it is the original bail. *Wilson* v. *Hawkins*, 45.

2. If a notice of bail does not describe them either as housekeepers or freeholders, they may be rejected, *Cripp's Bail*, 387.

3. In the case of town bail, if the affidavit of justification does not exactly comply with the rule of T. T. 1 Will. 4, the bail are not to be rejected, but the plaintiff may have further time to inquire as to their sufficiency. *Id.*

4. Bail allowed to justify, although the affidavit of justification did not conform to the form given in the rule of T. T. 1 Will. 4. *Carter's Bail*, 187.

5. A proctor may be bail for a defendant. *Reynolds' Bail*, 389.

6. An insolvent cannot be allowed to justify bail in an action against him for a debt admitted in his schedule. *Stone's Bail*, 389.

7. A judge's order giving further time to put in bail, is not complied with unless the bail is not only taken, but the bail-piece is also transmitted and filed within the time. *Craig and others* v. *Evans*, 386.

8. An exception to bail, purporting to be an exception to only one of the two bail, is good. *Feltham* v. *King*, 388.

9. Stock in trade cannot be considered as "effects" mentioned in an affidavit of justification of bail. *Delwarte's Bail*, 390.

10. If bail on examination justify for different property from that mentioned in the affidavit, the defendant must pay the costs of the justification. *Id.*

11. It is not too late, after bail are sworn, to object that the costs of a former opposition have not been deposited. *Belt's Bail*, 609.

12. Where after bail has been put in to an action, the declaration is amended by the insertion of new counts upon distinct causes of action, and the plaintiff succeeds both upon the original and added counts, the bail are not liable for the general costs of the declaration, but of the original counts only; and it is the duty of the plaintiff on taxation to have such costs separately assessed. *Taylor and others* v. *Wilkinson and another*, 238.

13. Under rule H. T. 2 Will. 4, I. s. 81, judgment cannot be signed against country bail until eight days from the return of the scire facias, although notice of the writ has been given to the bail; and then only by leave of the Court. *Sanderson* v. *Brown*, 507.

14. The rule of H. T. 2 Will. 4, I. 24, is superseded by the Uniformity of Process Act, and therefore a plaintiff may put a bail-bond in suit immediately on the expiration of the time for putting in bail above. *Robinson* v. *Hawkins*, 575.

15. Service of a writ of summons on bail, after notice of the render of the principal, is irregular, and will be set aside. *Lewis* v. *Grimstone*, *The Same* v. *Wheatley*, 357.

16. On a rule to stay proceedings on a bail-bond, bail above having been put in, it is not necessary that it should appear on the affidavit that there was a rule for the allowance of bail. *Crosley* v. *Innes*, 192.

17. The Court will not order the bail-bond to stand as a security, if a trial has not been lost at the time the rule nisi was moved. *Id.*

BANKER.—See PLEADING, 22.

BANKRUPT.

See also EJECTMENT, 25. PLEADING, 3, 21.

1. The assignees of a bankrupt cannot under 6 Geo. 4, c. 16, s. 70, acquire the legal estate in premises mortgaged by him, on tendering the mortgage money after the day fixed for its payment by the condition of the mortgage. *Dunn and others* v. *Massey and others*, 227.

2. After a trader had committed an act of bankruptcy, the defendant, who assisted him in his business and was ignorant of such bankruptcy, in pursuance of a general authority for that purpose, sold some of his master's goods and applied the proceeds for his benefit. More than two months after the sale a fiat issued against the trader. In trover by the assignee for a conversion of these goods, the defendant pleaded, 1. Not guilty. 2. That the plaintiff was not lawfully possessed:—Held, 1st, that the defendant as he had received no express orders to sell the goods, but had acted under a general authority only, was guilty of a conversion; and that if the particular circumstances attending the sale afforded any defence, they should have been specially pleaded. 2nd, That the sale by the defendant was not protected by 6 Geo. 4, c. 16, s. 81, as he was a third person and the purchaser was the person dealing with the bankrupt, with respect to whose ignorance of the act of bankruptcy, so as to validate the sale, there had been no finding by the jury. *Pearson* v. *Graham*, 691.

BASTARDY.—See POOR, 28.

BILL OF EXCHANGE.

See also GAMING, 2. PLEADING, 13, 15. PRACTICE, 40. USURY.

1. "Bill for, &c., due on, &c., drawn by, &c., *is this day returned with charges, to which your immediate attention is requested*," is a sufficient notice to a drawer of a bill of exchange of its dishonour by the acceptor. *Grugeon* v. *Smith*, 516.

2. The holder of a bill of exchange told his attorney to give notice of the dishonour in the name of a previous indorser, this was done but without the authority of that indorser:—Held, that notice. *Rogerson* v. *Hare*, 65.

3. In an action against the drawe change, who had never, between the the bill and its coming to maturity, h hands of the acceptor:—Held, that the acceptor was unnecessary. *Terry*

4. In an action by the indorsee a ser of a bill, where the indorsemen but the making of the bill admitted, t not account for an alteration in its *Fisher*, 711.

BILL OF LADING

Assumpsit against A., B. and C. f corn alleged to have been shipped by board the vessel of the defendants. ants B. and C. that the plaintiff did n The cargo in fact had not been shipp ter of the vessel had signed a bill of ledging the shipment by defendant A. was the managing owner, and h habit of dealing with the plaintiff by to him for sale on commission:—Hel tiff could only prove his shipment by agency of defendant A., who was cog circumstances, that the plaintiff himse considered cognisant of them, and t lading therefore did not estop defend from contradicting its contents, by fact there had not been any such shipm v. *Watling and others*, 429.

BROKER.—See AGENT,

CANALS.—See POOR,

CERTIORARI.

See also PRACTICE, 30

1. If a cause has been removed by ce inferior Court after judgment, a rule for quashing the certiorari, though th tled to a rule for a procedendo. *O* 593.

2. Certiorari granted to a prosecuto indictment for forcible entry and det sessions. *The Queen* v. *Thomas and ot*

3. Certiorari granted to remove a pr before the commissioners of sewers, i the chairman confessed he was ignor applicable to the case. *The King* v. *Le* 60.

4. Where a writ of certiorari had and the usual recognisances entered in of several defendants, an application procedendo, unless the other defendants and plead during the term and take trial, was refused, although as the tria pressed on against the other defendant and the necessity of two distinct trials *The King* v. *Newton and others*, 497.

5. The notice required by 13 Geo. previous to removing an order of justi Sessions by certiorari, must be given t who were present in Court when the or *The King* v. *Rattislaw*, 185.

6. A rule to quash the certiorari, that such notices were not given, may

lute, although the objection is made so late that a fresh certiorari cannot be obtained. *The King* v. *Rattislaw*, 185.

7. The respondents in an appeal, in which the order of justices was made, may take that as a ground of objection to the certiorari. *Id.*

CHAPEL.

1. Prohibition. The declaration stated that the plaintiff had been rated for the repairs of the parish church, under a rate levied upon three only out of four townships constituting the parish, whereas the fourth township was also liable. Plea, that the fourth township had from time immemorial a chapel of its own, at which the inhabitants had enjoyed divine rites, that the costs of repairing such chapel had been exclusively paid by such inhabitants, who had never been rated for the repairs of the parish church, absque hoc, that all four townships were rateable for such last mentioned repairs:—Held, that the plaintiff had not by joining issue on this traverse, admitted the facts stated in the inducement of the plea. *Craven* v. *Sanderson and others*, 694.

2. An amended plea, setting out the same facts as the former plea, but concluding with an averment that the fourth township was not rateable, and with a verification, having been found for the defendants:—Held, that it must be presumed, after verdict, that the chapel was coeval with the parish church and not a mere chapel of ease, and that the exemption of the fourth township might, therefore, be sustained. *Id.*

3. The 3 Geo. 4, c. 72, s. 20, enacts that all churches built by virtue of the 58 Geo. 3, c. 45, in aid of the churches of the parishes or places in which they shall be situated, shall be repaired by the parishes or places at large to which such chapels shall belong:—Held, that a township, which had been always exempt from all rates for the repairs of the parish church, was not liable to be rated for the repairs of a chapel, built under these acts, and situated within another township. *Id.*

CHARTER-PARTY.—See Evidence, 14.

CHEQUE.—See Evidence, 19. Pleading, 8.

CHURCH-RATE.—See Chapel, 3. Poor, 5.

CLERK OF ASSIZE.

1. The clerk of the session of gaol delivery of Newgate is not entitled either by ancient usage or statute to any fee in respect of convicts sentenced to hard labour. *The Queen* v. *Baker*, 699.

2. He is entitled by statute to the fee usually paid in respect of convicts sentenced to transportation; and the Court granted a mandamus, for the purpose of ascertaining the amount of the fee usually so paid, although his predecessor had not for 25 years received any fee whatever. *Id.*

COGNOVIT.

1. If a person attests a cognovit as attorney for a defendant who is in custody on mesne process, and it turns out afterwards that he is not an attorney, but that the defendant was not aware of the fact, the cognovit may be set aside. *Wallace* v. *Brockley*, 382.

2. It is sufficient if the attorney declares verbally at the time, that he signs as attorney of the defendant, as it is not necessary that it should appear on the attestation. *Wallace* v. *Brockley*, 382.

3. If a defendant is in custody on final process, and a writ of summons has issued on the judgment, it is not necessary that an attorney should be present on his behalf when he signs a cognovit. *France* v. *Clarkson*, 383.

4. To support an application to the Court to set aside a judgment on a warrant of attorney, on the ground that no attorney was present on behalf of the defendant, it is not sufficient that it should appear that the defendant was in custody; it must appear that he was in custody on mesne process. *Lewis* v. *Gomperts*, 592.

COMMON.

See also Pleading, 25.

A prescription whereby the occupier of B. claimed to have the sole and exclusive right of pasture and feeding of sheep and lambs in and upon, &c. as to B. belonging and appertaining:—Held, 1st, only to entitle the occupier of B. to depasture, &c. with sheep and lambs levant and couchant on B.; 2nd, That the depasturing the locus in quo by the occupier of B. with sheep and lambs not his own property, but taken in "on tack," was properly characterised by the judge at the trial as an usurpation in itself, and not evidence of any right to depasture the locus in quo with such sheep and lambs, although admissible as evidence in support of the alleged prescription. *Jones* v. *Richards*, 276.

COMPENSATION.

See also Mandamus, 4.

On an inquiry before a jury, to assess compensation for lands taken by a Company under a Railway Act, the words in the act, "costs of taking the verdict," do not include fees to counsel, attorney, or surveyor. *The King* v. *Gardner*, 7.

CONTEMPT.—See Sheriff, 2, 3.

CONTRACT.

See also Covenant. Restraint of Trade.

1. A contract between A. and B. for A. to serve B., and B. to employ A. *for one whole year from a certain day named, and so from year to year to the end of each year commenced*, so long as the parties respectively please, is a yearly contract, and can only be determined at the end of a current year. *Williams* v. *Byrne*, 535.

2. In an action for the breach of such contract, if either party rely upon the existence of a custom authorising him to determine the contract upon a reasonable notice previous to the end of a current year, such custom must be expressly alleged as a fact on the record, and it is not enough to aver simply that a reasonable notice was given. *Id.*

CONTUMACE CAPIENDO, WRIT DE.

1. A writ de contumace capiendo must be addressed to the sheriff of the county of which the party contumacious is described in the significavit, and if addressed to the sheriff of another county is irregular, and the Court will quash it on motion. *The King* v. *Ricketts*, 294.

2. A writ de contumace capiendo, directed to the sheriff of one county, and reciting a significavit,

CROWN.—See Mandamus, 2.

CURATE.

The Courts of Law cannot take cognizance of any disputes respecting the salary of a curate appointed under the statute of 57 Geo. 3, c. 99, in an action by him for arrears of his salary. *West* (*Clerk*) v. *Turner* (*Clerk*), 262.

CUSTOM.

See also Contract, 2.

1. A custom is good for all victuallers, upon the waste of a manor selected by the lord for holding fairs yearly, to erect booths and place posts and tables there a reasonable time before the first, and to continue them until a reasonable time after the last of such fairs, they paying him therefore 2d. each. *Tyson* v. *Smith*, 288.

2. A custom on the occasion of perambulating the boundaries of a parish in Rogation week to enter a particular house within the parish, but neither upon the boundary line nor in any way necessary to the course of the perambulation, cannot be supported. *Taylor* v. *Dewy and another*, 646.

DAMAGES.

See also Surety. Warranty.

Where the goods of a party have been seized under lawful process against him improperly executed, and he pays a sum of money to release them, he is entitled to recover in an action of trespass damages to the full amount of the money paid, and the measure of damages is not limited by the injury actually sustained. *Sowell* v. *Champion and others*, 667.

DEBT.

Quære, Whether debt will lie upon judgment of quarter sessions, which is directed by a local act to be registered and deemed a record of that Court to all intents and purposes. *The King* v. *The Nottingham Old Waterworks Company*, 166.

DEVISE.

See also Copyhold. Will, 6.

1. A devise of lands to the use and intent that R. D. and W. L. shall and may receive the rents, &c. and pay the same to J. J., vests the legal estate in the former. *Doe* d. *Gratrex and another* v. *Homfray*, 18.

2. A testator, after bequeathing several pecuniary legacies, devised as follows: "I do hereby give and devise unto W. L. and A. his wife, for and during their natural lives, all and every my messuages, lands, tenements, hereditaments, and premises whatsoever, in the city of Norwich, or elsewhere, in the kingdom of Great Britain. And from and after the decease of the said W. L. and A. his wife, my mind and will is, the said messuages, lands and tenements hereditaments and premises, shall be equally divided unto and amongst such of the children of the said W. L. and A. his wife, as shall be then living, share and share alike." There was a residuary clause as to personal, but none as to real property:—Held, that the children took life estates only. *Silvery* v. *Howard*, 109.

3. Under the following devise: "I give and bequeath unto my wife A. H., to her heirs and assigns for ever, all the residue of my goods, chattels, and personal estate whatsoever and wheresoever, and also all my right, title, and interest, of, in, and to all and every sum and sums of money whatsoe is, are, or shall be due to me upon a any will, bond, or other securities, and make my wife full and sole executrix o house situate in Great Queen Street:"- fee simple in the house passed to the *Hickman* v. *Hazlewood*, 116.

4. The following devise: "I appo whole and sole executor of all my hou situate at F." gives a fee simple. *Pratt and others*, 113.

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DISTRESS.—See Landlord and T

DISTRINGAS.

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See also Evidence, 6. Stam

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20. Rule nisi for judgment against the casual ejector granted, where service had been on two out of three assignees of the tenant, who was a bankrupt, and could not be found. *Doe* d. *Fisher* v. *Roe*, 219.

21. Where the tenant could not be found, and it could not be ascertained whether the premises were legally vacant, service of the declaration, by sticking it on the premises, was held sufficient for a rule nisi for judgment. *Doe* d. *Law* v. *Roe*, 187.

22. In ejectment by a mortgagee, where the mortgagor was purposely keeping out of the way to avoid service, and where it was not clear that the premises were legally vacant:—Held, that a service of the declaration, by merely sticking it on the premises, was sufficient to have a rule nisi for judgment against the casual ejector. *Doe* d. *Smith and others* v. *Roe*, 69.

23. An acknowledgment by letter, dated on the first day of term, of the service of the declaration held sufficient. *Doe* d. *Notting* v. *Roe*, 69.

24. An acknowledgment by letter, received on the second day of term, dated the day before the term, of the service of the declaration, held sufficient to grant a rule nisi for judgment. *Doe* d. *Buttram* v. *Roe*, 69.

III. *Other Matters.*

See also EVIDENCE, 20. PRACTICE, 43.

25. Lessor assigned premises and at his request lessee signed an acknowledgment of the assignee's title, and also paid him 1*s.* in pursuance of such acknowledgment; lessor afterwards became a bankrupt:—Held, on ejectment brought by such assignee against the assignees under the bankruptcy, who defended as landlords of the bankrupt, that it was competent to them to shew that the above acknowledgment of title was procured by misrepresentation, and that the assignment was invalid. *Doe* d. *Plevin and another* v. *Brown and another*, 677.

26. On the execution of a conveyance in fee by lease and release, it was verbally agreed that the vendor should occupy the property until the death of either himself or the purchaser. On the death of the purchaser notice to quit was given to the vendor. The vendor also died shortly after the expiration of the notice, but his widow continued in possession. On ejectment brought against her, it was held, that she could not set up a mortgage executed by her husband previously to the conveyance, although the purchaser was cognisant of this mortgage at the time of the sale, because her possession was derived from the purchaser, under whom the plaintiffs claimed. *Doe* d. *Leeming and another* v. *Skirrow*, 517.

27. On moving for the landlord's rule, under the statute 1 Geo. 4, c. 87, s. 1, the execution of the lease was allowed to be sworn to by a person who was present at the execution, but was not the attesting witness. *Doe* d. *Gowland* v. *Roe*, 605.

28. In a country ejectment, if the notice is to

CROWN.—See MANDAMUS, 2.

CURATE.

The Courts of Law cannot take cognizance of any disputes respecting the salary of a curate appointed under the statute of 57 Geo. 3, c. 99, in an action by him for arrears of his salary. *West (Clerk)* v. *Turner (Clerk)*, 252.

CUSTOM.

See also CONTRACT, 2.

1. A custom is good for all victuallers, upon the waste of a manor selected by the lord for holding fairs yearly, to erect booths and place posts and tables there a reasonable time before the first, and to continue them until a reasonable time after the last of such fairs, they paying him therefore 2*d*. each. *Tyson* v. *Smith*, 288.

2. A custom on the occasion of perambulating the boundaries of a parish in Rogation week to enter a particular house within the parish, but neither upon the boundary line nor in any way necessary to the course of the perambulation, cannot be supported. *Taylor* v. *Dewy and another*, 646.

DAMAGES.

See also SURETY. WARRANTY.

Where the goods of a party have been seized under lawful process against him improperly executed, and he pays a sum of money to release them, he is entitled to recover in an action of trespass damages to the full amount of the money paid, and the measure of damages is not limited by the injury actually sustained. *Sowell* v. *Champion and others*, 667.

DEBT.

Quære, Whether debt will lie upon judgment of quarter sessions, which is directed by a local act to be registered and deemed a record of that Court to all intents and purposes. *The King* v. *The Nottingham Old Waterworks Company*, 166.

DEVISE.

See also COPYHOLD. WILL, 6.

1. A devise of lands to the use and intent that R. D. and W. L. shall and may receive the rents, &c. and pay the same to J. J., vests the legal estate in the former. *Doe* d. *Gratrex and another* v. *Homfray*, 18.

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4. Judgment against the casual ejector granted, the notice having been to appear in the King's Bench, the Court having since become the Queen's Bench, by the demise of the crown. *Doe* d. *Davis* v. *Roe*, 606.

5. A mistake in the copy of the notice served on one tenant, as to the name of another tenant, is immaterial. *Doe* d. *Messer* v. *Roe*, 393.

6. A declaration in ejectment is not bad on arrest of judgment, because it omits to state the parish or vill. *Doe* d. *Edwards and others* v. *Gunning and others*, 460.

7. In ejectment the declaration described the lands as "ten acres of land situate in the county of S." On motion in arrest of judgment, held sufficient. *Littledale*, J. dubitante. *Id.*

II. *Service.*

8. Rule to shew cause why a service should not be deemed good, though the Christian name of the tenant could not be discovered. *Doe* d. *Cowan* v. *Roe*, 607.

9. Rule nisi granted for judgment against the casual ejector, where the declaration was read over and explained to the wife of the tenant, and a copy of it marked, which copy was afterwards left with another person on the premises. *Doe* d. *Eaton* v. *Roe*, 392.

10. Service on the lessee of the premises, which he usually underlet to weekly tenants, but which had been unoccupied some time:—Held a good service. *Doe* d. *Hayne and others* v. *Roe*, 72.

11. Rule nisi granted for judgment against the casual ejector, where the tenant had refused to take the declaration, and had shut the door, whereupon it was pushed under. *Doe* d. *Lord Somers* v. *Roe*, 220.

12. The declaration was served on a person who denied that he was the tenant, but from the description of his person a neighbour said he had no doubt that he was the tenant:—Held, a good service. *Doe* d. *Hunter* v. *Roe*, 195.

13. Rule nisi granted for judgment against the casual ejector, where there had been service on the daughter of the tenant in possession, who was stated to be in a mad house, but who was supposed to be keeping out of the way. *Doe* d. *Jones* v. *Roe*, 607.

14. Rule nisi granted for judgment against the casual ejector, where the service was on a servant at the house where the tenant lived, who was stated to be too ill to be seen. *Doe* d. *Messer* v. *Roe*, 393.

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27. On moving for the landlord's rule, under the statute 1 Geo. 4, c. 87, s. 1, the execution of the lease was allowed to be sworn to by a person who was present at the execution, but was not the attesting witness. *Doe* d. *Gowland* v. *Roe*, 605.

28. In a country ejectment, if the notice is to

appear in Easter term, a rule will be granted as of course in Trinity term, for judgment against the casual ejector. *Doe* d. *Wiggs* v. *Roe*, 391.

29. On moving for judgment against the casual ejector, a service on the "tenant in possession" must be sworn to, even though it cannot be discovered who is the tenant in possession. *Doe* d. *Fraser* v. *Roe*, 392.

30. Rule absolute granted for judgment against the casual ejector, on an affidavit stating a service on W. S., tenant in possession, together with A. B., C. D. and E. F. *Doe* d. *Doulan* v. *Roe*, 220.

31. An affidavit in support of a motion in ejectment, intituled "*Doe* v. *Roe*," omitting the lessor's name, is bad, though the declaration is annexed. *Doe* d. *Watson* v. *Roe*, 75.

32. An affidavit in support of a motion in ejectment, intituled "Doe, on the demise, &c." instead of "demises," with the declaration annexed, held good. *Doe* d. *Walters and others* v. *Roe*, 75.

33. The affidavit on which judgment against the casual ejector is moved, need not distinguish how the demises are stated in the declaration, so long as all the names of the lessors are inserted. *Doe* d. *Muller* v. *Roe*, 607.

34. It is no reason why the lessor of the plaintiff should not have execution in ejectment for not confessing lease, entry, and ouster, that the defendant has taken the benefit of the Insolvent Act, and did not therefore appear, having no interest. *Doe* d. *Westminster* (*Marquis*) v. *Suffield*, 359.

35. A person who from his own ignorance and that of his attorney, has allowed judgment to be signed in ejectment against the casual ejector, may be let in to defend on payment of costs. *Doe* d. *Pollen* v. *Roe*, 371.

36. A person who was working mines under a license to do so, which gave him no interest in the land, on being served with a declaration in ejectment, applied to the Court to stay the proceedings, but was refused. *Doe* d. *Johns and others* v. *Roe*, 66.

37. A plaintiff in ejectment sued out a writ of possession upon a judgment more than a year old, and obtained possession, without having previously issued a writ of scire facias. The writ was set aside by a judge at chambers, but the plaintiff refused to give up possession. A rule nisi for a writ of restitution having been obtained, the Court refused to make it absolute in terms, but granted a rule absolute, directing the plaintiff to restore possession of the lands. *Doe* d. *Stevens* v. *Lord*, 652.

ERROR.—See Criminal Matters, 2.

ESCAPE.

See Prisoner, 3. Sheriff, 1.

ESTOPPEL.

See Bill of Lading. Ejectment, 25. Evidence, 21.

EVIDENCE.

See also Agent, 2. Bill of Exchange, 4. Bill of Lading. Common. Ejectment, 25. Executor, 1. Highway, 1. Limitations, Statutes of, 1. Pleading, 8, 9, 10, 11, 18, 22, 2 Surety. Tender. Will, 2, 8

1. It was agreed by deed that e building society should pay a fixed long as he continued a member. A tions and fines, &c. were to be con perty. A person signed the deed a ing a share given him for his remu tary, but it was afterwards agreed should cease to be a member, and sh salary instead:—Held, that he was witness to prove the breaches of a member, by non-payment of his su certain fines. *Rigby and others* v.

2. A release, reciting that he ha member, and releasing his demands executed by himself alone, does not petent witness. *Id.*

3. If a witness at the time of giv has no recollection of a fact except a book, his evidence of that fact ca unless the book is produced. *How* 78.

4. In trover against the sheriff for of the plaintiff, an affidavit made by ployed by the under-sheriff in an ap under the Interpleader Act, is admis for the plaintiff to prove that W. was sheriff, and that the sheriff by W. goods. *Brickill* v. *Hulse*, 610.

5. Indictment for obstructing a not guilty. At the trial it was proved exist in the locus in quo, but it was no public road. Forty years before, a de of the land over which the road passed near the road, and at the time of pl that he did so "to mark the road, to boundary of it was when he was a that this statement was not admissible a declaration accompanying an act, or made against the interest of the speake tenant in fee, or as evidence of reputat v. *Bliss*, 624.

6. Where by the practice of an Court the act of the Court in grantin dorsed on the will itself, and no othe act is kept, the original will, so indor evidence to shew a person is executo *wards and others* v. *Gunning and othe* d. *Basset and another* v. *Mew*, 463.

7. The sanity of a testator being issue, letters addressed to him by per quaintance, long since dead, and found of the testator with the seals broken an board under his bookcase in his priv ther with other letters, some indorsed some of which he had written answe missible in evidence; per *Tindal*, C. *Bosanquet*, J., and *Coltman*, J.; *diss. Gurney*, B. *Wright* v. *Doe* d. *Tatha* 539.

8. A letter so found addressed to the ing him to communicate with his att lived at some distance from the testat ter of business, and who had been which was indorsed by the attorney per *Tindal*, C.J., *Park*, J., and *Gu Parke*, B., *Bosanquet*, J., and *Coltman*

9. Where the genuineness of a party's handwriting is disputed, the jury may compare the document in question with other documents in the genuine handwriting of the party, provided they are in evidence for other purposes in the cause. But no document may be given in evidence for the sole purpose of such comparison, unless the disputed handwriting is ancient. *Doe* d. *Perry* v. *Newton and Wife*, 403.

10. A person was called to prove his signature as attesting witness to a will. Upon cross-examination, he admitted that several signatures which were shewn to him, and which were not in evidence for other purposes in the cause, were his. To disprove the signature to the will, an inspector at the Bank of England was called, who stated, that previous to the trial he had examined and become familiar with the admitted signatures, but did not know them to be written by the witness till he had heard him say so at the trial; he was then asked whether, in his opinion, the signature to the will was a genuine or an imitated signature:—Held, by Lord *Denman*, C. J. and *Williams*, J., that such evidence was admissible; by *Patteson* and *Coleridge*, Js. that it was not. *Doe* d. *Mudd* v. *Suckermore*, 405.

11. The assignment of his estate by an insolvent debtor, who has been discharged under 53 Geo. 3, c. 102, cannot be proved by a certified copy of the assignment, as under 7 Geo. 4, c. 57, s. 76. *Doe* d. *Threlfall and another* v. *Sellers*, 160.

12. A copy certified according to 7 Geo. 4, c. 57, s. 76, of an assignment to the provisional assignee, made under 1 Geo. 4, c. 119, is admissible in evidence, without proof that the insolvent has been adjudged to be entitled to his discharge. *Doe* d. *Ellis* v. *Hardy*, 614.

13. On an indictment for perjury in an affidavit made in the Insolvent Court, in order to prove that such affidavit was required by the practice of that Court, an officer of the Court attended with a printed copy furnished him by the clerk of the rules, of a paper hung up in a room adjoining the Court by its authority, and containing its rules of practice. Independently of the printed copy produced, the witness had no knowledge of the practice, and he had never compared it with the authorized paper:—Held, that the practice of the Court had not been proved. *The King* v. *Koops*, 148.

14. By the custom of Batavia, parties about to enter into a contract go before a notary public, who, after inscribing in a book the contract signed by them, gives them each a copy. A copy may also be obtained at any time afterwards by either party in the absence of the other. These copies, in all countries subject to the Dutch law, except at Batavia, where the notary's book must be produced, are valid evidence of the contract:—Held, 1st, That a copy duly authenticated under the hand and seal of the notary, but not identified as one of those delivered at the time of making the contract, nor proved to have been examined with the entry in the notary's book, was not evidence of a charter-party. 2nd, That the defendant's admission, that goods had been duly conveyed, such admission containing in its terms a reference to a charter-party, did not entitle the plaintiff to a verdict on the common count, even for nominal damages, without proof of the charter-party. *Brown* v. *Thornton*, 11.

15. On an issue as to the boundary of a private estate, a witness having stated that he knew it to be identical with that of a hamlet:—Held, that evidence of reputation as to the boundary of the hamlet was admissible to shew the boundary of the private estate. *Thomas* v. *Jenkins*, 265.

16. The defendant's son, a boy at school, being in want of clothes, had them supplied to his own order just before the holidays; he then took them home with him in his box, and brought them back again to school after the holidays:—Held, that there was evidence of an implied contract by the father sufficient to be left to the jury. *Law and another* v. *Wilkins*, 235.

17. Assumpsit, for not keeping and leaving premises, of which the defendant was tenant, in good and sufficient repair, according to agreement. Plea, payment of 5*l.* into Court, and that the plaintiff had not sustained greater damage:—Held, that evidence was admissible on the part of the defendant to shew what was the condition of the premises when he entered upon them. *Sir Francis Burdett, Bart.*, v. *Withers*, 444.

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19. In an action on a banker's cheque, to which the defendant pleaded that he did not make the cheque modo et formâ, the instrument, which was unstamped, was proved by the plaintiff and read without objection. The defendant then tendered evidence that the cheque was post dated, and therefore inadmissible in evidence for want of a stamp:—Held, that as the cheque was unobjectionable on the face of it, that the defendant was not precluded after it had been read, from objecting to it as inadmissible in evidence. *Field* v. *Woods*, 482.

20. Lands were devised to trustees to sell absolutely, and invest the proceeds in other lands to be

held by them in trust, to permit W. B. D. to receive the rents and profits during his life, remainder over. The trustees did not sell but permitted W. B. D. to receive the rents and profits during his life. In ejectment brought to recover these lands on the death of W. B. D. by the heirs of the surviving trustees, after proof by them that W. B. D. was in receipt of the rents and profits:—Held, that they might also give in evidence an annuity deed executed by W. B. D., wherein was recited the will, and that the trustees had not sold the lands, and that W.B.D. was in the receipt of the rents and profits by permission of the trustees, on the ground that it contained a declaration in derogation of his apparent right to the fee. *Doe* d. *Sheriff and others* v. *Coulthred and another*, 477.

21. Trover. Plea, that A. was jointly interested with the plaintiff, and that defendant committed the conversion alleged by leave and licence of A. Replication, that A. was not a joint owner with the plaintiff. At the trial it was proved on the part of the plaintiff, that the property was by the defendant sold to the plaintiff while lying in a warehouse by a sale note, that it was transferred under the direction of the defendant by the warehouseman to the account of the plaintiff, and that payments were made by the plaintiff to the defendant:—Held, notwithstanding the issue raised on the pleadings, that the conduct of the defendant estopped him from supporting it by proof that A. was jointly interested in the property, and that the alleged conversion was made by his authority. *Kieran* v. *Saunders*, 267.

22. A commission directed to the judges of a foreign court, requiring them to take the examinations of certain witnesses, to reduce them into writing, and to send the same to this Court, is not properly executed by a return of an examined copy of such examinations, although certified by an officer of the foreign court to be a correct copy, and such copy is therefore inadmissible in evidence. *Clay* v. *Stephenson*, 537.

EXECUTION.—See ATTORNEY, 33. DAMAGES.

EXECUTORS AND ADMINISTRATORS.

See also EVIDENCE, 6.

1. Where the plaintiff had recovered damages against the defendant as administratrix, for trespasses committed by the intestate in digging coal six months before his death, under the 3 & 4 Will. 4, c. 42, s. 2:—Held, 1st, that an action for money had and received would also lie for the amount of coals taken and sold by the intestate more than six months before his death; and 2nd, that from the quantity of coal so taken, the jury might infer the amount of money so had and received. *Powell and others* v. *Rees*, 680.

2. Debt on a judgment against R. and M. as executors of C. Plea, plene administravit præter, &c. Replication, traversing the plene administravit. At the trial it appeared that C. being indebted to R. deposited with him, as security for the money advanced, a life insurance policy, and communicated to the insurance company that he had transferred his interest in the policy to R., of which they made a minute in their books. C. afterwards appointed R. and M. his executors, and died without making a formal assignment of the policy. The insurance company having refused to pay the policy without a receipt from the they signed one as executors. R. delivered a protest, stating that he to obtain the money, and that he compromise his own claim:—Held lien upon, and was entitled to app ceeds to the payment of his cla *Rowntree and another*, 280.

FAIR.—See CUSTOM,

FEES.—See CLERK OF A

FRAUDS, STATUTE

See also PLEADING, I

Where an agreement was entered defendant in a Chancery suit and th licitor, with the consent of the plain sideration of the suit being discontin ant should pay to the solicitor the costs:—Held, as the plaintiff had n that this was an agreement by defen debt of another, within sect. 4 of Frauds, and ought to have been red *Tomlinson* v. *Gell*, 229.

GAMING.

1. The statute 5 & 6 Will. 4, c. 4 much of 9 Anne, c. 14, and other st securities given for illegal consider void, is prospective. *Hitchcock* v. *W*

2. Where therefore an action bro fide holder of a bill of exchange, gambling debt, was at issue before the former act, but was tried afterwards, the plaintiff could not recover. *Id.*

GAOL.

The mayor and aldermen of Londo rized by 4 Geo. 4, c. 64 (the Gaol such a classification of prisoners as t Newgate persons committed thereto by magistrates for misdemeanours. *The K*

GILBERT'S ACT.—See POOR

HABEAS CORPUS.

See also PRACTICE, 36, 3

The Court refused a habeas corpus body of a person in prison under senten for the purpose of having him tried felony. *In re Hardwick*, 197.

HIGHWAY.

See also EVIDENCE, 5. NUISA

1. Township of S. was indicted for road lying within it. Plea, not gu proved to be liable generally to the roads. For the defence an agreemen dated 1591, between the owners of the and the owners of the neighbouring tow the making of a road and the repair question by N., and also for the app lawyer to prepare proper instruments formance. It was also proved, that in Chancery had been filed by the owners

9. Where the genuineness of a party's handwriting is disputed, the jury may compare the document in question with other documents in the genuine handwriting of the party, provided they are in evidence for other purposes in the cause. But no document may be given in evidence for the sole purpose of such comparison, unless the disputed handwriting is ancient. *Doe* d. *Perry* v. *Newton and Wife*, 403.

10. A person was called to prove his signature as attesting witness to a will. Upon cross-examination, he admitted that several signatures which were shewn to him, and which were not in evidence for other purposes in the cause, were his. To disprove the signature to the will, an inspector at the Bank of England was called, who stated, that previous to the trial he had examined and become familiar with the admitted signatures, but did not know them to be written by the witness till he had heard him say so at the trial; he was then asked whether, in his opinion, the signature to the will was a genuine or an imitated signature:—Held, by Lord *Denman*, C. J. and *Williams*, J., that such evidence was admissible; by *Patteson* and *Coleridge*, Js. that it was not. *Doe* d. *Mudd* v. *Suckermore*, 405.

11. The assignment of his estate by an insolvent debtor, who has been discharged under 53 Geo. 3, c. 102, cannot be proved by a certified copy of the assignment, as under 7 Geo. 4, c. 57, s. 76. *Doe* d. *Threlfall and another* v. *Sellers*, 160.

12. A copy certified according to 7 Geo. 4, c. 57, s. 76, of an assignment to the provisional assignee, made under 1 Geo. 4, c. 119, is admissible in evidence, without proof that the insolvent has been adjudged to be entitled to his discharge. *Doe* d. *Ellis* v. *Hardy*, 614.

13. On an indictment for perjury in an affidavit made in the Insolvent Court, in order to prove that such affidavit was required by the practice of that Court, an officer of the Court attended with a printed copy furnished him by the clerk of the rules, of a paper hung up in a room adjoining the Court by its authority, and containing its rules of practice. Independently of the printed copy produced, the witness had no knowledge of the practice, and he had never compared it with the authorized paper:—Held, that the practice of the Court had not been proved. *The King* v. *Koops*, 148.

14. By the custom of Batavia, parties about to enter into a contract go before a notary public, who, after inscribing in a book the contract signed by them, gives them each a copy. A copy may also be obtained at any time afterwards by either party in the absence of the other. These copies, in all countries subject to the Dutch law, except at Batavia, where the notary's book must be produced, are valid evidence of the contract:—Held, 1st, That a copy duly authenticated under the hand and seal of the notary, but not identified as one of those delivered at the time of making the contract, nor proved to have been examined with the entry in the notary's book, was not evidence of a charter-party. 2nd, That the defendant's admission, that goods had been duly conveyed, such admission containing in its terms a reference to a charter-party, did not entitle the plaintiff to a verdict on the common count, even for nominal damages, without proof of the charter-party. *Brown* v. *Thornton*, 11.

15. On an issue as to the boundary of a private estate, a witness having stated that he knew it to be identical with that of a hamlet:—Held, that evidence of reputation as to the boundary of the hamlet was admissible to shew the boundary of the private estate. *Thomas* v. *Jenkins*, 265.

16. The defendant's son, a boy at school, being in want of clothes, had them supplied to his own order just before the holidays; he then took them home with him in his box, and brought them back again to school after the holidays:—Held, that there was evidence of an implied contract by the father sufficient to be left to the jury. *Law and another* v. *Wilkins*, 235.

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20. Lands were devised to trustees to sell absolutely, and invest the proceeds in other lands to be

JUDGMENT AS IN CASE OF A NONSUIT.

1. Judgment as in case of a nonsuit cannot be moved for in the same term that default has been made, although issue was joined two terms previously. *Gripper* v. *Lord Templemore*, 65.

2. If issue is joined in a country cause in Trinity term, the defendant cannot have judgment as in case of a nonsuit in Hilary term. *Robins* v. *East*, 74.

3. Issue was joined in a country cause in Michaelmas term, and no notice of trial was given for the next assizes:—Held, that a rule for judgment as in case of nonsuit, moved for in Trinity term, was not too early. *Revett* v. *Hutchinson*, 370.

4. Issue was joined in February, and the next day the plaintiff obtained an order for a writ of trial; no notice of trial was given, and several days on which the sheriff held his Court passed by:—Held, that a rule for judgment as in case of a nonsuit could not be moved for in Easter term. *Stacey* v. *Jeffrys*, 184.

5. Issue was joined in a London cause in August, the plaintiff obtained an order for a writ of trial in October, but no notice of trial was given:—Held, that the defendant could not move for judgment as in case of a nonsuit in Hilary term. *Fox* v. *M'Cullock*, 183.

6. If a plaintiff gives notice for trial at a sittings in term, and does not enter the case for trial, the defendant may move for judgment as in case of a nonsuit on the day of the sittings, before the Court sits at Nisi Prius. *Cope* v. *Levi*, 574.

7. After obtaining a rule nisi for the plaintiff to find security for costs, the defendant cannot the same day have a rule nisi for judgment as in case of a nonsuit. *Anker* v. *Robinson*, 394.

JUSTICE OF THE PEACE.

See also MASTER AND SERVANT, 1. POOR, 22.

1. A magistrate is entitled to a notice of action under 24 Geo. 2, c. 44, if he has acted bonâ fide, believing himself to be in the execution of his duty, although he had no reasonable ground for what he did. *Wedge* v. *Berkeley*, 271.

2. The question of bona fides is for the jury to determine, and if the plaintiff has not desired to have it left to them, bona fides will be presumed. *Id.*

LANDLORD AND TENANT.

See also COVENANT, 2. EJECTMENT, 25. EVIDENCE, 17.

1. A. granted two several rent-charges to the lessors of the plaintiff, with powers of distress and entry in default of payment, and then made a lease for years to the defendant. The grantee of the second rent-charge, which was in arrear, recovered in ejectment against the defendant, who thereupon attorned tenant to him. Afterwards, the grantee of the first rent-charge also making a claim for arrears, A. and the two grantees referred the matter to an arbitrator, who made his award that the arrears due to the first grantee should be first satisfied. This award having been served upon the defendant, he declared in writing, "that he had attorned to and become the tenant" of the first grantee, to whom also he paid rent:—Held, that a tenancy from year to year was created between them, and that the right of the defendant under his lease was suspended until the payment of such arrears. *Doe* d. *Chawner and others* v. *Boulter*, 333

2. An instrument containing the t
of certain premises, stipulated that
agreed to be granted should be gra
after the alleged lessor should obta
same premises under an agreement
into for that purpose:—Held, it ap
that the alleged lessor had no pow
that the instrument therefore was o
for a lease. *Hayward* v. *Haswell*,

3. The following instrument is a
not a lease:—"An agreement made
H. &c. and E. &c.: H. agrees to m
to E. a good and valid lease of al
&c., to hold to E. for seven years, fr
at the rent of 105*l.* payable half yea
ment to be made on, &c. And it
that the said lease shall contain a
part of E. to pay the said rent; also
mages by fire excepted); also a pro
on non-payment of the rent twenty-o
same shall become due, or on non-per
of the covenants on the lessee's part
And E. agrees to accept of such leas
a counterpart thereof. And E. furthe
and so soon as the messuages on eit
said messuage shall become tenanted
additional rent of 15*l.* during the re
forth to come of the said term. An
or before June next, to erect eight
front of the drawing-room windows, to
staircase, &c. &c. And it is hereby
the said lease hereby to be granted, t
shall be 120*l.*; and that by a separa
date the day next after the said inde
H. shall release to E., out of the annua
the annual sum of 15*l.* The said E. t
at his own cost, to be approved of by t
citor. N. B. It is agreed that H. ma
portunity of making the lease fourteen
son v. *Eicke*, 675.

4. After execution of an agreemen
certain premises the lessor mortgaged
that the mortgagee having given notice
under the agreement to pay the rent
maintain an action of use and occup
such tenant, in respect of his occupa
mortgage and notice. *Id.*

5. An outgoing tenant, after the de
his demise, quitted the premises, lea
without asking permission, a cow an
There were no facts to shew what was
so leaving them:—Held, that this did
such a possession of the premises as
landlord to distrain under 8 Anne, c. 1
Taylerson v. *Peters and another*, 644.

6. *Quære*, whether, after issue joine
for seizing the plaintiff's cattle, the la
plaintiff can satisfy the distress under wh
were seized. *Id.*

LEASE.—See LANDLORD AND TEN

LIBEL.

See also EVIDENCE, 18.

In an action of libel, where the m
publication proved is not beyond all
jury may put their own construction, an
defendant, although the judge give ther
opinion that the publication is libellous
Fairford, 10.

LIEN.—See EXECUTOR, 2.

LIMITATIONS, STATUTES OF.

See also AMENDMENT, 2. ATTORNEY, 23.

1. An expression in writing, that if a debt was not paid it was very fit it should be, with other slight expressions, having been left to a jury to say whether there was an acknowledgment of the debt, so as to take the case out of the statute of limitations, and the jury having found that there was, the Court granted a new trial. *Poynder* v. *Bluck*, 191.

2. Where a tenant at will, having kept possession of land without acknowledgment for upwards of twenty years, died before the passing of the 3 & 4 Will. 4, c. 27 (the Limitation Act):—Held, that section 7 did not give his heir at law title to maintain ejectment against a third person, within the five years after the passing of the act, allowed to the real owner by s. 15. *Doe* d. *Thompson* v. *Thompson*, 236.

MALICIOUS ARREST.—See PLEADING, 4.

MANDAMUS.

See also CLERK OF ASSIZE. CORPORATION, 1, 4, 5, 7. POOR, 24, 29, 30. QUO WARRANTO, 2. SAVINGS' BANK. SESSIONS, 14, 17.

1. *Semble*, that there must be eight days between the teste and return of a writ of mandamus. *The King* v. *The Governor and Directors of the Poor of the Parishes of St. Andrew, Holborn, and St. George the Martyr*, 395.

2. Mandamus to the commissioners of woods and forests to compel them to pay poor rates for crown lands in their occupation, refused. *The King* v. *The Commissioners of Woods and Forests*, 364.

3. One of a board of paving commissioners having entered into a contract to do some work for the board, the Court refused a mandamus directing them to advertise for fresh tenders to do the work. *The King* v. *The Paving Commissioners of St. Margaret and St. John*, 48.

4. A mandamus had issued to a company under a local act, directing them to summon a jury before the Court of Quarter Sessions for the assessment of damages to a party grieved. The verdict and the judgment thereon were, according to the act, to be registered and deemed records of the sessions to all intents and purposes, but no specific mode was given for recovering such damages. The damages having been assessed, and the company refusing to pay them, the Court issued a second mandamus to compel payment, on the ground that it was not clear whether an action of debt would lie on such a judgment of quarter sessions, and that a mandamus was the only clear and effectual remedy. *The King* v. *The Nottingham Old Waterworks Company*, 166.

5. Mandamus lies to the treasurer of a county to compel him to deposit with the clerk of the peace, pursuant to 12 Geo. 2, c. 29, books containing a statement of the accounts and balances between himself and the county, although the materials for those accounts, tradesmen's bills, &c., and his vouchers, have already been deposited, and although such books contain his acquittances by the magistrates, and are his only means of proving his discharge; and although he has already delivered in the books to the justices, and they have returned them to him; and although they may contain other matters relating to other persons. *The King* v. *Payn*, 142.

6. A rule for a mandamus will be made absolute if enough remains unanswered to warrant it, even although there has been wilful misrepresentation and suppression of facts in the affidavit on which the rule nisi has been obtained. *The King* v. *Payn*, 142.

7. Mandamus to churchwardens and overseers to make a poor rate, recited that no rate had been made for the necessary relief of the poor, pursuing the form given by the Crown Office:—Held, that the writ was good, and that it sufficiently appeared that a rate had become necessary. *The King* v. *The Overseers of Edlaston*, 163.

8. Mandamus against churchwardens and overseers may be sued out by one of their own body. *Id.*

9. 1 Will. 4, c. 21, does not affect the law concerning the parties by whom a mandamus may be prosecuted. *Id.*

10. The mayor of Oxford declared T., one of the council, disqualified, on the ground that his name was not on the burgess lists of the year; and another person having been elected in his room, refused to allow T. to take any part in the proceedings of the council. A rule for a mandamus to the corporation to restore T. was discharged with costs, on the grounds, 1st. That the election of the new councillor not being merely colourable, quo warranto was the proper remedy, and not mandamus, to restore the applicant to an office filled by another; 2nd. That the corporation not having taken part in the removal of the applicant, the rule was misdirected. *The King* v. *The Mayor, &c. of Oxford*, 125.

MARKET.

1. Where the owner of a market toll free, on removing it to another site within his manor, had demised the new market-place subject to the market, but with power to the lessees to impose rents or other sums on persons selling there; it was held that the new market-place did not afford to the public the same accommodation which they had previously enjoyed, and that therefore a person who had, after the removal, erected a stall for the sale of goods in the old market-place, which was in a public street, was not guilty of a nuisance. *The King* v. *Starkey*, 502.

2. A person indicted for a nuisance in erecting a stall in the old market-place, after a wrongful removal of the market, may set up the wrongfulness of the removal as a defence, and need not proceed by scire facias to repeal the grant of the market. *Id.*

MASTER AND SERVANT.

See also BANKRUPT, 2.

1. Under 6 Geo. 3, c. 25, justices of the peace have no jurisdiction to interfere on occasion of disputes between masters and domestic servants relative to their contracts of hiring. *Kitchen* v. *Shaw*, 278.

2. Where a servant, who had been engaged at a salary for a term certain, was wrongfully dismissed, and after tender of his services for the residue of the term, and the non-acceptance of them by his master, immediately brought indebitatus assumpsit to recover the salary for such residue:—Held, that even if indebitatus assumpsit would lie, the action could not be commenced till the end of the term. *Smith* v. *Hayward*, 635.

3. Assumpsit for salary. The declaration stated a contract, by which the defendant retained the plaintiff as teacher in his school for a year. Breach, that

the defendant did not allow the plaintiff to continue, &c. Plea, that the plaintiff promised the defendant not to absent himself from the school; that he did absent himself for an unreasonable time, to wit, two days, wherefore the plaintiff discharged him. Replication, that after the absence the plaintiff returned, and continued until his discharge. After a verdict for the defendant, the Court held that the plea amounted to a confession and an insufficient avoidance, and allowed judgment to be entered for the plaintiff non obstante veredicto. *Fillieul* v. *Armstrong*, 616.

MEMORANDA, 339.

MINES.—See OFFICE.

MONEY HAD AND RECEIVED, ACTION FOR.—See EXECUTOR, 1.

MORTGAGE.
See LANDLORD AND TENANT, 4. PLEADING, 18.

MUNICIPAL CORPORATION.
See CORPORATION.

NEWGATE.—See GAOL.

NEWSPAPERS.—See EVIDENCE, 18.

NEW TRIAL.
See also COSTS, 4. PRACTICE, 17.

1. Misdirection upon one point is a good ground for a new trial, although the jury *may* have rightfully found their verdict upon another point as to which there was no misdirection. *Doe* d. *Read* v. *Harris*, 106.

2. Where the damages are under 20*l*. the Court will not grant a new trial on the ground that the verdict is against evidence, although the decision is one affecting the inhabitants of a large district. *Sowell* v. *Champion and others*, 667.

3. The Court will not grant a new trial on the ground of the verdict for the defendant being against evidence, in a case tried before the sheriff, where the sum sought to be recovered is under 5*l*. *Lyddon* v. *Coombs and another*, 207.

NOTICE OF ACTION.
See JUSTICE OF THE PEACE, 1.

NUISANCE.
See also HIGHWAY, 2. MARKET.

1. Defendants were indicted for a nuisance committed by the erecting of planking, &c. within the limits of a harbour. A special verdict found, that in consequence of the erection of the planking, the harbour in some extreme cases was rendered less secure:—Held, that consequences so slight, uncertain and rare, as were stated by this special verdict, were not sufficient to constitute a nuisance. *The King* v. *Tindall and others*, 316.

2. The Court will discharge an indictment for a nuisance by erecting a building on part of a highway, on a merely nominal fine, when the nuisance has been removed, if it appears that the public has not suffered any real inconvenience. *The King* v. *Earl of Dunraven*, 577.

3. A rule for that purpose cannot be absolute in the first instance. *Id.*

OFFICE.

The King by the same deed demised the lot and cope and all his mineral rights in a manor, and also appointed the lessee to the office of barmaster. The interests of the lessee being at variance with the duties of barmaster, held, that the appointment to such office was void. *Arkwright* v. *Cantrell*, 686.

OUTLAWRY.

1. Rule granted to amend the return to a writ of capias utlagatum. *The King* v. *Garegan*, 393.

2. The Court will on motion grant the reversal of an outlawry after final judgment, for presumed irregularity, without requiring, as a condition of the reversal, that the defendant should pay interest from the time of the judgment. *Ibbotson* v. *Fenton*, 281.

OVERSEERS.—See POOR, 28.

OVERSEERS' ACCOUNTS.
See SESSIONS, 15, 16.

PARISH BOUNDARY.—See CUSTOM, 2.

PARTICULARS OF DEMAND.
See also PLEADING, 11.

1. In an action against the Marshal for an escape a judge's order having been obtained for the particulars of the time and place of the alleged escape, the Court discharged, with costs, a rule to rescind the order. *Davis* v. *Chapman*, 273.

2. If by mistake credit is given in the particulars of demand for sums which are disputed, the Court will allow the plaintiff to amend them. *Preston* v. *Whitehead*, 363.

3. In debt on bond for breach of covenant in a lease, the Court refused to compel the plaintiff, before plea pleaded, to give a particular of the sum unpaid for rent, and of the breaches by non-repair, for which the action was brought. *Souter* v. *Hitchcock*, 361.

PATENT.

1. The specification of a patent improved chair stated the invention to consist "in the application of a self-adjusting leverage to the back and seat of a chair, whereby the weight on the seat acts as a counterbalance to the pressure against the back." Before this patent was taken out, a chair had been made and sold by B., to which the same mechanical principle had been applied, although the operation of it was incumbered by some additional machinery:—Held, that the patent could not be sustained, inasmuch as the specification claimed more than the patentee had invented, and would have precluded B. from making his own chair. *Minter* v. *Mower*, 262.

2. *Semble*, that had the specification been for an improvement only in the application of the principle, it would have been good. *Id.*

PAUPER.—See POOR. PRACTICE, VIII.

PLEADING.

I. *Declarations.*

See also ASSUMPSIT, 3. CONTRACT, 2. EJECTMENT, 6, 7. PRACTICE, 25. SHERIFF, 3. WARRANTY, 1.

1. A scire facias to revive a judgment is a proceeding in the original cause, and is within the pleading rules of H. T. 4 Will. 4, the pleadings in it must

therefore be intituled according to those rules. *Collins* v. *Beaumont*, 363.

2. In trover by husband and wife for an inventory, the declaration stated, that by indenture of mortgage, certain goods mentioned in an inventory annexed to the said indenture, were assigned to the wife before their marriage, with a proviso, that if the mortgagor should repay her 95*l.* on the 24th October, 1837, or on such earlier day as she should require by a written notice, and should until such repayment pay 5*l.* per cent. interest, the indenture should be void; that the plaintiffs had obtained possession of the deed and inventory, but not of the goods; that being so possessed of the inventory, they lost it; that the defendant found and converted it. On demurrer—Held, as the goods were not to be taken out of the mortgagor's possession until after default by him, and as none might be made during the whole coverture, that in the action for the inventory which related to them, the wife was not improperly joined. *Ayling and Wife* v. *Whicher*, 154.

3. Declaration on a promise by a bankrupt to pay a creditor in full, in consideration of his proving his debt under the commission, held bad on motion in arrest of judgment. *Brearley, Assignee*, v. *Andrew*, 481.

4. In an action on the case for suing out a ca. sa., and arresting the plaintiff for more money than was due, the want of an averment of malice in the declaration is fatal on arrest of judgment. *Saxon* v. *Castle and others*, 305.

5. In case for wrongfully obstructing plaintiff in the rightful use of a cistern, the declaration stated that the defendant wrongfully locked up a door-way leading to the cistern, and thereby hindered the plaintiff from having access to the cistern. The pleas traversed the right to use the cistern, on which issue was joined and found for the plaintiff. The judgment was afterwards arrested, because the declaration did not disclose any right of passage to the cistern through the door-way obstructed either directly or by shewing that there was no other way. *Tebbutt* v. *Selby*, 312.

6. In an action on the case for selling goods after they have been replevied, the declaration should aver notice to the defendant of the replevin. *Mounsey* v. *Dawson and another*, 283.

II. *Pleas.*

See also Arbitration, 14. Bankrupt, 2. Bill of Exchange, 4. Chapel, 1, 2. Evidence, 21. Insurance, 6. Master and Servant, 3. Surety.

7. A plea stating the appointment of the plaintiff as a curate under the act 57 Geo. 3, c. 99, and that the action was brought to recover his salary touching which disputes had arisen, is properly pleaded in bar and not to the jurisdiction, and the nature of the disputes need not be particularly specified in the plea. *West* v. *Turner*, 252.

8. In an action on a banker's cheque which has been post-dated, the want of a stamp need not be specially pleaded. *Field* v. *Woods*. 482.

9. To an action for business done as an attorney, the defence that no bill duly signed has been delivered, must be specially pleaded. *Lane* v. *Glennie*, 479.

10. The plea of payment into Court given in the 17th rule H. T. 4 Will. 4 admits all the causes of action stated in the declaration. *Booth* v. *Howard*, 54.

11. The particulars of demand are not to be considered as incorporated with the declaration, so that the items claimed by them are not admitted. *Id.*

12. A plea of non assumpsit in an action of debt is a nullity, and the plaintiff may sign judgment. *King* v. *Myers*, 372.

13. In an action against the acceptor of a bill of exchange, who was under terms to plead issuably, the Court allowed him to plead a judgment recovered against him on the same bill by a third person. *Hubberstey* v. *Lord Langford*, 572.

14. Declaration stated in consideration that plaintiff would take possession of a house belonging to the defendant partly furnished, and would, so soon as it should be completely furnished by the defendant, become tenant thereof to him at a certain rent, that defendant promised to furnish the house completely: it then averred that plaintiff had taken possession, and was willing to become tenant, but that defendant refused to furnish as aforesaid. A plea that the contract was an entire contract respecting interest in lands, and that there was no note of it in writing, was held good on special demurrer. *Mechelen* v. *Wallace*, 468.

15. The declaration in assumpsit stated that defendant was indebted to plaintiff in 703*l.*, and in consideration thereof and that plaintiff would sell defendant goods to the value of 534*l.*, and would give him time for the payment of the said 703*l.*, that defendant promised to pay the two sums by accepting a bill for their aggregate amount. It then averred delivery of the goods sold, the giving time for payment, and a tender of a bill for 1237*l.* to be accepted. Breach, that defendant would not pay the said aggregate amount by acceptance of said bill or otherwise. The 1st plea stated that the goods sold exceeded 10*l.* in value, and that there was no note in writing of the contract, &c. as required by the Statute of Frauds. The 2d plea, that said goods were warranted by plaintiff of a certain quality, that they were of inferior quality and of no value, and that defendant returned them within a reasonable time. On general demurrer to the pleas, because they respectively answer that part only of the declaration which related to the sale of goods, whereas they professed to answer the whole of it, the Court held:—1st. That each plea afforded a complete answer to the whole cause of action, by shewing a failure of part of the consideration for the defendant's promise: 2nd. That the Court could not pick out of the record a good cause of action, and give judgment for plaintiff, on the ground that it appeared that at the time of the promise there was a good cause of action to the amount of 703*l.*; for defendant in assumpsit can only be made chargeable for a breach of the promise laid, which promise was not to pay the 703*l.*, but to fulfil a specific arrangement by accepting a bill for that sum, and for a new liability then in contemplation. *Head* v. *Baldrey*, 464.

16. A declaration in assumpsit contained two counts, each of them alleging defendant to be indebted to the plaintiff in the sum of 10*l.* The damages were laid at 20*l.* The defendant pleaded to the whole declaration, first, non assumpsit, and secondly, payment of 10*l.* in satisfaction. Before the trial a nolle prosequi was entered as to one of the counts. Verdict for the defendant on the plea of

payment:—Held, on motion for entering judgment for the plaintiff non obstante veredicto, on the ground that payment of 10*l.* had been improperly pleaded in satisfaction of a larger sum, that the plea must be considered with reference to the state of the record at the time of the trial, at which time it was a good plea; and that even if imperfect, it would be cured by the verdict. *Wright* v. *Acres*, 328.

17. In debt for goods sold, &c. the defendant pleaded as to 10*l.* 3*s.* a set-off, but only proved 8*l.* 3*s.*; as to 3*l.* 3*s.* 6*d.* he pleaded a plea which he proved; and as to the residue, he paid a sum into Court, which was taken out by the defendant. There was no plea of nunquam indebitatus:—Held, that the plaintiff was entitled to a verdict and judgment for the 2*l.* unproved on the first plea, although the 8*l.* 3*s.* proved, together with the 8*l.* 3*s.* 6*d.* and the sum paid into Court, amounted to the sum claimed by the particulars of demand. *Green* v. *Marsh*, 343.

18. Trover. Pleas: 1. Not guilty; 2. That plaintiff was not possessed as of his own property. The plaintiff having a mortgage upon the goods in question, which were afterwards taken under a fi. fa. at the suit of a third party against the mortgagor in whose possession they remained, allowed them to be sold to the defendants without giving notice of his claim, although he attended twice at the premises on which the goods were seized, and knew that a sale was in contemplation:—Held, that on the second issue the opinion of the jury should have been taken, whether he had not, in point of fact, parted with his property in the goods. *Pickard* v. *Sears and another*, 678.

19. To a declaration in a time policy of insurance on a ship, alleging a loss by the perils of the sea, a plea that after the making of the policy and before the loss the ship was unseaworthy, but might with reasonable care and for small cost have been repaired by the plaintiff, yet that he well knowing the premises, did not repair, and that the ship continued unseaworthy until the loss, was held bad on special demurrer, on the ground that it should, at all events, have averred distinctly that the plaintiff knew of the unseaworthiness, and that the loss happened through the want of repair. *Quære*, would the plea have been good if it had contained such averments? *Broderick* v. *Hollingsworth*, 689.

20. Declaration alleged, that the plaintiff sold to the defendant not less than 5000 nor more than 6000 trees, to be well taken up by the plaintiff at the usual and proper time of the year, and to be delivered to the defendant. The declaration then averred, that the plaintiff did well and properly take up 6000 trees (without laying the number under a videlicit, or averring that it was not less than 5000 or more than 6000) and offered to deliver them to the defendant. Plea, that the plaintiff did not well and properly take up or offer to deliver 6000 trees. On special demurrer to the plea, on the ground that the defendant had improperly made the number material, and that the plea was double in traversing both the taking up and the offer to deliver:—Held, 1st, that as the declaration itself, by not averring that the number was within the limits prescribed by the contract, had made the number material, because, without taking the number to be material, there was no averment of performance on the part of the plaintiff, that therefore the plea was not bad for traversing the number; 2nd, that the plea was bad for duplicity, in traversing both the properly taking up and the offer to deliver the trees. *Smith* v. *Dixon*, 447.

21. Mandamus to churchwardens to make a rate to repay money lent under the Church Building Act, on the credit of the rates. Return, that a fiat in bankruptcy had issued against one of the lenders, who were the prosecutors of the writ. Plea, that the sum lent was advanced out of money vested in the lenders as trustees for &c. (naming the parties), and the bankrupt was only interested as trustee. On special demurrer, assigning for cause that the instrument creating the trust ought to have been set out, or the manner of creating it:—Held, that the plea as between these parties was good. *The Queen* v. *The Churchwardens of Brancaster*, 650.

22. A distinct and separate allegation in a plea that certain persons were a banking company illegally associated, within 3 & 4 Will. 4, c. 98, is not compounded of fact and law, and therefore traversable. *Secus*, had the plea stated certain facts and then gone on to allege "whereby they were illegally associated," or words to that effect. *Ransford* v. *Copeland*, 398.

III. *Replications.*

23. In assumpsit on a banker's cheque, to a plea that it was given as a security for a gambling debt, de injuriâ is a good replication on general demurrer. *Curtis* v. *The Marquis of Headfort*, 567.

24. If a plaintiff takes out of Court a sum paid in by the defendant in satisfaction of his demand, he is not at liberty to pass over without replying to other pleas, rendered necessary by a larger claim made by his particulars of demand, and therefore the costs must be taxed as if a nolle prosequi had been entered as to those pleas. *Topham* v. *Kidmore*, 341.

25. To a declaration in case for disturbance of the plaintiff's common, by putting on divers cattle, the defendant pleaded a right of common, and that the said cattle were his own commonable cattle. The plaintiff replied, that all the said cattle in the declaration mentioned were not the defendant's own commonable cattle; in manner and form as in the plea alleged:—Held, that under this replication the plaintiff could not give evidence of a surcharge by the defendant, which should have been the subject of a new assignment. *Bowen* v. *Jenkins*, 511.

POOR.

I. *Rate.*

See also MANDAMUS, 2. SESSIONS, 20.

1. Real property ought to be rated to the poor according to its actual value as combined with machinery attached to it, without considering whether that machinery be real or personal property, as to be liable to distress or seizure, or whether would descend to the heir or executor, or belong the expiration of a lease to landlord or tenant. *Queen* v. *Guest and others*, 651.

2. By a local act guardians of the poor were rected to make a survey and valuation of all hereditaments, and to assess the same the poor-rate. A gas company having been rated its gasometer as a warehouse or building at it was worth to let by the year, although other piers were not rated in respect of steam-engines other machinery affixed to their premises for purposes of manufacture, or for the increased

ir premises by such machinery:—Held, e was bad for inequality. *The King* v. *gham and Staffordshire Gas Company*, 224.

issioners under two local acts were autho- e and light a town and to levy a rate on nts. They were also authorised to erect a gas apparatus, and after sufficiently streets to let out gas to individuals: the ing from the gas so let out to be applied, defraying the expense of the apparatus, e overplus, if any, to be applied generally oses of the act. Under these acts the ers purchased gas-works from a person ways been rated for them to the relief of id after supplying the town with gas, let lights. The money and surplus thus e appropriated to the purposes of the acts: at they were not rateable to the poor, as the gas-works, in respect of such surplus. . *The Commissioners of the Beverley Gas-*

the passing of the 57 G. 3, the freemen f York, who were occupiers of houses in d, were entitled to right of stray over ds of which persons named in the act in fee. By that act, which extinguished stray, commissioners were appointed to did allot to the mayor and commonalty s of the lands as should be a compensa- se rights, to be held by them, free of all ghts, to be enjoyed by the said freemen in the same manner as the right of stray. of the lord mayor and aldermen held an- ure-masters are appointed to regulate the of the rights of stray, direct repairs of and appoint the herdsman. The pasture- under the superintendence of the war- hom the lord mayor is always one, the being aldermen. The wardens are them- r the general control of a court, formed mayor, aldermen, existing and ex-sheriffs. nan's wages and other expenses are de- m annual sum paid by the freemen for of cattle. The pasture-masters render unts to the wardens, the balance of which carried forward to the succeeding year. wardens nor the mayor and commonalty benefit from or on account of the stray. lly to the act, the wardens and pasture- portions of the allotments, and with part eived purchased five acres of land, which ed to them and their heirs in trust for the This land is enjoyed as the other:—Held, yor and commonalty were rateable to the pect of the lands allotted, but not of the ested in the wardens and pasture-masters. . *The Mayor, &c. of York*, 132.

local act trustees were empowered to bor- for the purpose of pulling down and rebuild- a church, and to charge the sum borrowed to be made under the act "on houses, , shops, buildings, lands, tenements, and nts, rated or rateable to the poor of the , on all and every the tenants and occu- said parish:"—Held, that tithes were rate- *King* v. *The Justices of Buckinghamshire*,

0 G. 3, c. cxiv. a canal company was in- and empowered to take rates, tolls, and a the canal, and by s. 49 it was enacted, that the said rates, tolls, and duties should at all times thereafter be exempted from the payment of taxes, rates, assessments, or impositions whatsoever, any law or statute to the contrary notwithstanding, other than such taxes, rates and assessments as the land which should be used for the purpose of the said navigation would have been subject to if the act had not been made. The 23 G. 3, c. xcvii. passed for incorporating the river Douglas navigation with the said canal, and for amending the first-mentioned act, repealed the above exempting clause, and substituted the following: "And be it further enacted and declared, that the said several navigations, cuts, canals, and every part thereof, and the said tolls, rates and duties to be taken upon the same or any part thereof, under the authority of this or either of the aforesaid acts, shall at all times be exempted from the payment of any taxes, rates, assessments, or impositions whatsoever, other than and except such taxes, rates and assessments as the land which hath been or shall be used for the purpose of navigations, cuts or canals were or would have been subject to if this act had not been made; and that such navigations, cuts or canals shall not be subject or liable to the payment of any taxes, rates or assessments (save and except such taxes, rates and assessments as have been and now are usually charged and assessed thereon), any law or statute to the contrary notwithstanding, but nothing in this clause shall exempt any quay, warehouse or other house from the payment of any rates, taxes or assessments." The 59 G. 3, c. cv., which passed for effecting a junction between the Leeds and Liverpool and another canal, after continuing the provisions of the former acts, except such as were thereby repealed or altered, contained the following section: "And be it further enacted, that all and every the lands, dwelling houses, wharfs, quays, warehouses, lockhouses, and other houses of and belonging to the said company of proprietors, shall be rateable and chargeable to the maintenance of the poor, and to all parochial rates and taxes in the several parishes, townships or places where they are respectively situate, the lands according to the quantity and quality, and the dwelling houses, wharfs, quays, warehouses, lockhouses, and other houses, according to the nature and respective uses, dimensions and descriptions thereof; and shall be charged and assessed in like manner as lands *of a like quality*, and as dwelling-houses, warehouses, lockhouses, and other houses of like and similar size, nature, dimensions or descriptions in the respective parishes, townships or places where the same shall be situate, are or shall be assessed and charged."—Held, 1st, that land occupied by the canal, basins, and towing path of the original canal was rateable according to the value of similar adjacent property in the parish at the time of making the rate. 2nd. That a basin and three branches, not being part of the original line of the canal, but communicating with it in the same parish, were rateable on their amount in value as mere land at the time of rating, without regard to the use to which they are applied. 3d. That the wharfs occupied by the company were rateable according to the value of similar property in the parish at the time of rating. 4th. That in these acts of parliament the words "land used for navigation cuts or canals" and "navigation cuts or canals" mean the same thing. *The Queen* v. *The Leeds and Liverpool Navigation Company*, 654.

II. *Parish Apprentices.*

7. The assignment and acceptance of a parish ap-

prentice (in one instrument) were in the following words:—"Thomas Melhuish doth hereby assign the said Elizabeth Matthews, and M. P. doth hereby agree to accept the said Elizabeth Melhuish:"—Held, that the misnomer did not vitiate the acceptance. *The King* v. *The Inhabitants of Exminster*, 244.

8. Under 56 G. 3, c. 139, s. 2, which requires a notice of a binding to be given to the officers of a foreign parish into which a parish apprentice is bound, notice of the *assignment* of such apprentice is not necessary. *Id.*

III. *Settlements.*

9. An indenture of apprenticeship executed in a foreign country by a person of full age:—Held, to confer a settlement by residence under it in this country, without proof of the law relating to apprenticeship in that foreign country. *The King* v. *The Inhabitants of Clotsworth*, 28.

10. Where the service of pauper with a second master was a constructive service to the first, to whom the pauper was under apprenticeship, it is immaterial to the question of settlement that the second master was ignorant of such apprenticeship. *The King* v. *The Inhabitants of Sandhurst*, 34.

11. To gain a settlement under 1 W. 4, c. 18, the whole of the tenement taken must be actually occupied by the party taking it, although it consist of more dwelling-houses than one, and the single house occupied be worth more than 10*l.* of the whole rent. *The King* v. *The Inhabitants of Berkswell*, 30.

12. Pauper, since the passing of 59 G. 3, c. 50, rented and occupied two granaries in different parts of the same parish at 4*l.* and 7*l.* a year respectively, for more than a year, and paid the whole rent. Each granary formed the entire upper floor of a detached building in a yard. There was no communication between the granary and the rest of the building in either case, nor any access to it except from the outside by means of a moveable ladder placed in the yard:—Held, that the granaries were not distinct buildings within the above statute, and that no settlement was gained. *The King* v. *The Inhabitants of Henley-upon-Thames*, 39.

13. By indentures of lease and release, a pauper conveyed certain freehold lands to trustees, upon trust to sell and before the sale to collect the rents, &c., and *covenanted upon request to surrender certain copyhold lands* to them or their vendee, and until such surrender, to stand seised of the copyhold lands in trust for them; and that the said trustees, after the surrender, should stand seised in trust to sell, and after the sale should hold the proceeds in trust to pay B.'s debts, and hand over the surplus to him:—Held, that after the execution of the indentures, a pauper, by residence of forty days in the parish where the copyhold estate lay, though not upon the estate itself, gained a settlement. *The King* v. *The Inhabitants of Ardleigh*, 398.

14. Where an instrument not under seal purports to demise incorporeal hereditaments as well as land, and the sessions find that the land alone is worth more than 10*l.* a year, a settlement may be gained in respect of the occupation of the land under such in-

16. Pauper in 1817 was en stock. He was to receive 12 the keep of one cow, four she lands of his master, and also house upon the premises, wh and always occupied by the o He was to go into the house at he commenced taking charge pulated that he should not b house without notice to quit tended the stock and occupied under this agreement. The pauper occupied as servant, b opinion of the Court. The C the finding was not necessar disturb it. *The King* v. *The* 42.

17. No contract of hiring a under which was not comple time (14th August, 1834) of W. 4, c. 76, s. 65, confers a the service already performed, tract and partly not, exceed *King* v. *The Inhabitants of Ri*

18. Pauper being asked by he would have the ostler's plac entered upon the service, for th time was fixed. No other con the hiring. Pauper continue five years, and until his maste other servants also left. Befo had a dispute, when his mast dissatisfied with your place y you like;" and the pauper co berty to leave, or liable to be time. The sessions considerin not a general or yearly hiring, the pauper's removal, subject Court. The Court held that t was not necessarily wrong, an *The King* v. *The Inhabitants of* 40.

19. Settlement by paying rat ment subsists notwithstanding W. 4, c. 18; and the actual o the latter act, does not apply to the pauper occupied, &c. and ment conformably to the form settlement was gained by paym he had underlet part and could settlement by renting a teneme *Inhabitants of Stoke Damarel*, 2

IV. *Other Ma*

See also QUO WARRANTO

20. The Poor Law Commiss under the 4 & 5 W. 4, c. 76, s. tion of a board of guardians, for the relief of the poor in the pari parish having already a board local act. *The King* v. *The Poo* 79.

21. The Poor Law Amendm c. 76, authorises the Poor La

22. *Quære*, whether a justice has power, since the 4 & 5 W. 4, c. 76, s. 54, to order relief to be given an infant found in a parish, it being unknown where the infant came from? *The King* v. *The Directors of the Poor of St. Pancras*, 362.

23. *Quære*, whether a person who takes care of such an infant, has any claim against the parish for his expenses? *Id.*

24. In such a case, however, the Court issued a mandamus immediately, ordering the parish authorities to receive and provide for the infant. *Id.*

25. A pauper, since the passing of the New Poor Law Act, 4 & 5 W. 4, c. 76, married a woman with three unemancipated children by a former husband, who was not settled in either of the contending parishes. By section 57 of the above act, the second husband is liable to maintain such children as part of his family until the age of sixteen or the death of their mother; and they are, for the purposes of the act, to be deemed a part of such husband's family accordingly:—Held, that they were not removable to the place of the second husband's settlement under an order adjudging them to be there settled. *The King* v. *The Inhabitants of Walthamstow*, 23.

26. *Quære*, would they have been removable under an order containing no adjudication of settlement, but adapted to the special circumstances? *Id.*

27. An order for the removal of a pauper and his children, omitting the names and ages of the children, is not on the face of it bad. Per *Coleridge*, J. *The King* v. *The Inhabitants of Withernwick*, 19.

28. Officers of a township elected by the inhabitants, and who bear the name and exercise functions similar to those of churchwardens, are not therefore overseers of the township; and accordingly their signature is not required to a notice of an application for a bastardy order. *The King* v. *The Justices of the North Riding of Yorkshire*, 395.

29. The 43 Geo. 3, c. 110, requiring parish officers to make payment annually of not less than one-twentieth part of moneys borrowed under 22 Geo. 3, c. 83, (Gilbert's Act,) does not bar the claim of any creditor neglecting to obtain such part payment. *The King* v. *The Inhabitants of Bighton*, 330.

30. Where, therefore, a creditor had lent money under the last-mentioned act thirty years since, without having received back any part of the principal, the Court directed a mandamus to the parish officers to repay the principal with all interest due thereon. *Id.*

PRACTICE.

See also AFFIDAVIT. AMENDMENT. ARBITRATION. ARREST. ATTACHMENT. ATTORNEY. BAIL. CERTIORARI. COGNOVIT. COSTS. CRIMINAL MATTERS. DISTRINGAS. EJECTMENT. INTERPLEADER. JUDGMENT AS IN CASE OF A NONSUIT. NEW TRIAL. NUISANCE. OUTLAWRY. PARTICULARS OF DEMAND. PRISONER. QUO WARRANTO. WARRANT OF ATTORNEY.

I. *Process.*

1. A capias directed "to the constable of the castle of Dover" is good. *Frank* v. *James*, 394.

2. If a practising attorney is proceeded against by capias, it is an irregularity merely. *Lefevre* v. *Wright*, 603.

3. In an action on a bail-bond it is unnecessary to indorse on the process the amount of the debt and costs. *Robinson* v. *Hawkins*, 575.

4. If a capias state the cause of action to be "on promises," but the affidavit of debt shews that the declaration must be either in debt or covenant, the defendant is entitled to be discharged, and he is not to be compelled to remain in custody until the declaration is delivered, even though he has not been prompt in his application to the Court. *Boddington* v. *Woodley*, 581.

5. An indorsement on a capias that payment of the debt and costs may be made within four days from the "execution" thereof, instead of "service," is not a ground for discharging the defendant out of custody, but may be amended. *Id.*

6. If a plaintiff sues out a writ of capias against several persons, he must declare against them all. *Viner* v. *Cooper and others*, 609.

7. Service of a writ of summons on an agent of the defendant disallowed, though the last known residence of the defendant was in the plaintiff's own house, and though it was of no use to the plaintiff to proceed to outlawry, it being an action for crim. con. *Close* v. *Parker*, 71.

II. *Appearance.*

8. Since the Uniformity of Process Act, a plaintiff has four terms within which he can enter an appearance for the defendant. *Liddel* v. *Cranch*, 384.

9. The penalty given to plaintiffs by the statute 9 & 10 Will. 3, c. 25, s. 33, where defendants do not enter appearances, cannot now be enforced. *Thomas* v. *Noakes*, 351.

III. *Declaration.*

10. If a defendant makes a demand of declaration before he is entitled to do so, the plaintiff need not obtain a rule to set it aside. *Callum* v. *Grayson*, 216.

11. Where a defendant is in custody, delivery of a declaration to an attorney for him is irregular, although the attorney may have attended summonses at chambers for him in the same action. *Spencer* v. *Newton*, 232.

IV. *Pleas.*

12. An attorney resident in London has only four days' time for pleading in a country cause, even since the passing of the Uniformity of Process Act. *Lowder* v. *Lander*, 385.

13. A summons for leave to plead several matters, served before, but returnable after the time to plead expires, and at the same hour when the judgment office opens, acts as a stay of proceedings, so that the plaintiff cannot sign judgment as for want of a plea. *Spenceley* v. *Shoals*, 196.

14. Defendant, in an action of debt, whose time for pleading expired on May 20th, delivered on that day several pleas, accompanied by a rule to plead several matters, returnable at three o'clock on the 22d, on which day, at eleven o'clock, the plaintiff signed judgment: The Court set aside the judgment without costs. *Wilkes* v. *Ottley*, 516.

15. After judgment has been signed in debt for want of a plea, the defendant, who had moved to set aside the judgment, before that motion was disposed of, obtained a judge's order to plead several matters, that his plea might be in readiness to prevent the signing of a second judgment for want of a plea, in

case the first should be set aside: the Court set aside the order without costs. *Wilkes* v. *Ottley*, 516.

16. On making a rule absolute, no cause being shewn, for the defendant to plead a plea puis darrein continuance the matter whereof had arisen more than eight days previously, the Court refused to insert in the rule that the plea might be pleaded without the usual affidavit. *Powell* v. *Duncan*, 198.

V. *Trial.*

17. In an action where the defendant had pleaded several special pleas whereon issue was joined, the plaintiff gave notice of trial for the third sittings in term, but gave no notice that the case would be taken as undefended. The cause was entered in the marshal's list as undefended. No notice was given by the defendant that the cause was defended, and no counsel appeared for him when the cause was called on:—Held, after verdict for the plaintiff, that the plaintiff had committed no irregularity in trying the cause as undefended; but as there was an affidavit of merits, the Court allowed a new trial on payment of costs. *Bland* v. *Warren*, 445.

18. The application to a judge in the course of a cause to direct a verdict for one or more of several defendants in trespass is strictly to his discretion, and that discretion is to be regulated not merely by the fact that at the close of the plaintiff's case no evidence appears to affect them, but by the probabilities whether any such will arise before the whole evidence in the cause closes. *Sowell* v. *Champion and others*, 667.

VI. *Changing the Attorney.*

19. A defendant, sued as the director of a company, who was also an attorney, entered an appearance as attorney; a plea was then pleaded by the company's attorney, there having been no order to change the attorney:—Held, that the plaintiff could not treat the plea as a nullity and sign judgment. *Harrison* v. *Wallingborough*, 205.

20. A rule to change the plaintiff's attorney ought to be served on the bishop before calling on him to make such a return of what had been levied under a levari facias de bonis ecclesiasticis. *Phillips* v. *Berkeley* (*Clerk*), 50.

VII. *Irregularity.*

21. An application to the Court to set aside a judgment as irregular, made six days after it was signed, application having been in the interim made to a judge, is sufficiently prompt. *King* v. *Myers*, 372.

22. A defendant was arrested on the 3d of May; on the 9th he applied to a judge to be discharged for irregularity, but was unsuccessful; term began on the 22d, and on the 31st he applied to the Court:—Held, that he had not been sufficiently prompt in his application. *Robins* v. *Grant*, 373.

23. Defendant having been arrested on the 16th of January, applied to the Court to be discharged on the ground of privilege. He afterwards, on the 3d of February, applied for his discharge on the ground of irregularity in the affidavit of debt:—Held, as it did not appear by affidavit when this irregularity first became known to him, that he was too late to take advantage of it. *Spencer* v. *Newton*, 232.

24. An attorney who was arrested on the 26th of August, and did not apply to be dis 3d of November, was held too late i *Lefevre* v. *Wright*, 603.

25. A declaration was delivered August, in which it was stated that been "summoned," whereas he h On the 21st an application, made judge at chambers to deliver up th cancelled on account of this varianc and the declaration, was refused. particulars of demand was then take was delivered with a protest:—He was an irregularity; 2nd, that it taking out the summons for the p pleading under a protest; 3d, that to have applied to a judge at cha the declaration for the irregularity; having done so, an application to first day of Michaelmas term was *Stevens*, 589.

26. On an application to the C decision of a judge as to a matter o party cannot insist on objections made before the judge, unless he is sonable time for making the applica v. *Woodley*, 581.

VIII. *Pauper.*

27. A plaintiff suing in formâ notice of trial was dispaupered for record, though advised by counsel sary to amend the pleadings. *Fa another*, 195.

28. If a plaintiff sues as a paupe granted that he should find securit ground that he is insolvent, until dispaupered. *Mylett* v. *Hucker*, 2

IX. *Rules.*

See also JUDGMENT AS IN CASE O NUISANCE, 3.

29. A rule for the defendant to h Court deposited in lieu of bail, is *Lover* v. *Talmin*, 75.

30. The Court will grant only first instance for a procedendo, a ca removed from an inferior Court wi recognizance having been entered i appears on the return to the certio demanded was under 20*l*. *Catton* v

31. The Court will grant a rule attesting witness to make an affidavi of a submission to arbitration, in ord made a rule of Court, though the wi only discovered the day before, and was nearly expired in which the pa bound to move to set aside the a *Todd*, 577.

32. A rule for filing a certificate costs and taxation thereon, under th sation Act, 6 & 7 Will. 4, c. 5, s. only. *Maynard* v. *Lackington*, 57

33. A rule for judgment as in ca an action where there were two drawn up as if there was only one d an error which ought to be amend *Jennings and another*, 58.

X. *Service of Rules, &c.*

See also 7, 11, and ATTACHMENT, 6.

34. Rule to compute made absolute, on a service by putting a copy of the rule nisi into a letter-box at the defendant's chambers, which was forwarded to him. *Carew* v. *Winslow*, 218.

35. Where an attorney was not living at the place of which he was described in the list at the Master's Office and could not be found, service of a rule to pay the costs of taxation, was allowed to be made on his agent. *Burrell* v. *Seaton*, 395.

36. A writ of habeas corpus having been personally served in France, under the authority of the French Courts, this Court refused to grant a rule absolute in the first instance for an attachment for a contempt, even under special circumstances. *Ex parte Wyatt*, 76.

37. Nor can a warrant be granted under the stat. 56 Geo. 3, c. 100. *Id.*

XI.—*Miscellaneous.*

38. Application may be made in the Bail Court to review the decision of a judge at chambers, although no new facts have been discovered. *King* v. *Myers*, 372.

39. After a rule has been made absolute in the Bail Court, the Court of Q. B., sitting in Banc, has no power to allow it to be re-opened and discussed, even although the judge who disposed of it has sanctioned an application for that purpose. *Tod* v. *Jeffery*, 613.

40. The plaintiff having arrested the defendant for the amount of a bill of exchange given for goods bought by the defendant of the plaintiff but not delivered, the Court refused to order the plaintiff either to deliver the goods or to sell them and apply the proceeds in payment of the bill. *Walton* v. *Machin*, 576.

41. Where it appears by the indorsement on a writ of summons that the sum claimed is of an amount recoverable in a Court of Requests, this Court will not grant a rule, that on payment of the amount claimed, the defendant should be relieved from the payment of all costs. *King* v. *Myers*, 372.

42. If the date when the writ issued is omitted on the record, as required by the rule H. T. 4 W. 4, evidence may nevertheless be given as to when it issued. *Godfrey* v. *Clements*, 47.

43. A defendant in ejectment, before he had appeared, obtained an order for particulars, and subsequently an order for ten days' time to plead after delivery of the particulars, on the terms of pleading issuably and taking short notice of trial. Four terms having elapsed before the delivery of particulars, the defendant was held, notwithstanding the indulgence granted him, entitled to a term's notice of any further proceedings on the part of the plaintiff; and the plaintiff having, after the expiration of four terms, signed judgment for want of a plea, the judgment was set aside, but without costs, as the defendant had not appeared, and the nominal party was defendant on the record. *Doe* d. *Vernon* v. *Roe*, 475.

44. A note in the margin of a general demurrer, setting out various causes of demurrer in the manner of a special demurrer, held sufficiently to comply with the rule H. T. 4 Will. 4, s. 2. *Whatmore* v. *Nichols*, 188.

45. On moving for a commission to examine witnesses, it is not necessary that the names of the examiners should be stated in the affidavits. *Fearon* v. *White*, 379.

46. A second continued notice of executing a writ of inquiry, which does not mention hour and place nor refer to the first notice, cannot operate as a good new notice, though given eight days before the day mentioned. *Prior* v. *Binns*, 601.

47. Speedy execution having been awarded under the stat. 1 W. 4, c. 7, and the money paid over, after which the defendant obtained a rule nisi to arrest the judgment:—Held, that the Court had no power to make the plaintiff pay the money into Court until the decision of the rule for arresting the judgment. *Morton* v. *Burn and another*, 57.

48. Rule granted, calling on a bishop to make a return generally of what had been levied under a levari facias de bonis ecclesiasticis, although the sequestration issued long before the bishop was appointed. *Phillips* v. *Berkeley* (*Clerk*), 50.

49. In shewing cause against a rule, affidavits may be filed up to ten days before the term when cause is actually shewn, although the rule may have been often enlarged. *In re Gompertz*, 300.

50. On enlarging a rule on the last day of term, the Court will allow it to be made a part of the rule that there should be a stay of proceedings. *Todd* v. *Gompertz*, 610.

PRESCRIPTION.—See COMMON.

PRESENTATION.—See ECCLESIASTICAL LAW.

PRINCIPAL AND AGENT.—See AGENT.

PRISONER.

1. It is not necessary to proceed by writ of detainer against a person in custody who goes beyond the rules, but he may be arrested on a capias. *Lefevre* v. *Wright*, 603.

2. It is not necessary that he should be beyond the rules at the time the capias issued. *Id.*

3. Where a person in custody went beyond the rules, and was arrested, collusion is no ground for setting aside the capias, though it might perhaps be a ground for the marshal to apply to the Court, an action having been brought against him for the escape by the person at whose suit he was in custody. *Id.*

4. The marshal has no authority to allow the benefit of the rules to prisoners confined for a contempt; such indulgence can only be granted by the Court, upon a special application for that purpose. *In re Gompertz*, 300.

5. If the warden of the Fleet refuses to obey a habeas corpus to remove a defendant into the King's Bench prison, on the ground that a commitment fee is unpaid, but which the defendant contends the plaintiff ought to pay, the defendant should obtain a rule calling on the warden to obey the habeas corpus, and may not pay the fee and then call on the plaintiff summarily to repay it. *Burt* v. *Bryant*, 360.

6. Where a defendant obtained the order of a judge for his discharge out of custody, on account of being supersedable, and the order was incorrect, and instead of applying to have it amended, did nothing for six months, when he applied for a rule absolute for his immediate discharge under the rule of H. T. 2 Will. 4,

I. 88, the Court refused the application. *Roxburg v. Creswell*, 197.

7. A defendant must have been confined within the walls of the prison to entitle him to his discharge under the 48 Geo. 3, c. 123. *Barnard v. Symonds*, 218.

PRIVILEGE.—See ARREST, 1, 2, 3.

PROCEDENDO.—See PRACTICE, 30.

PROMISSORY NOTE.
See BILL of EXCHANGE. USURY.

PROPERTY.—See EVIDENCE, 21. PLEADING, 18.

PUBLICATION.—See EVIDENCE, 18.

QUO WARRANTO.
See also CORPORATION, 7. MANDAMUS, 10.

1. A quo warranto information does not lie against a person for exercising the office of guardian under the Poor Law Amendment Act. *The King v. The Guardians of the Aston Union*, 329.

2. After the aldermen and assessors at a municipal election under 5 & 6 Will. 4, c. 76, have declared certain persons to be elected councillors, who, on notice of their election, have duly made the declaration required on acceptance of office, the offices are de facto full, and the proper mode of questioning the validity of the election is, therefore, by quo warranto and not by mandamus. *The King v. The Mayor, &c. of Winchester*, 525.

3. The Court refused a rule nisi for a quo warranto, which was applied for by a private relator, against a town clerk no longer in office, for the purpose of trying his right to compensation for loss of office under the Municipal Corporation Act. *The King v. Harris*, 237.

4. To obtain a rule for a quo warranto against a person elected to an office, on the ground that he had not the votes of the majority of the "inhabitants," it must be shewn what particular class of persons is intended by the word, and that he had not a majority of that class. *The King v. Mashiter*, 173.

5. Where several quo warranto informations, founded on the same grounds, are pending against different individuals for acting as aldermen of the same borough, the Court has no authority, on the application of one of the defendants, to stay the proceedings in his case until after the trial of one of the other informations. *The King v. Cozens*, 464.

6. On an application for a quo warranto against a corporator whose title to his office is clearly bad, the Court will nevertheless exercise a discretion, to be regulated by all the circumstances attending the application, and by the consequences likely to follow from granting it. *The Queen v. Parry*, 703.

7. Therefore, where the burgess list in a borough divided into wards had been revised by the mayor, with two assessors elected under the 37th section of the 5 & 6 W. 4, c. 76 for the whole borough, instead of the two assessors elected for the Mayor's Ward under section 43, and there was consequently no good list of burgesses by whom the defendant could have been duly elected councillor, the Court discharged a rule for an information against him, because the effect of such an information might be to dissolve the whole corporation, and it did not appear that at the revision any names on the lists were objected to, so as that the defendant might have been in a mi if the revision had been properly conducted. *Queen v. Parry*, 703.

8. A relator for a quo warranto may suppo case by the testimony of persons who are them unqualified to be relators. *Id.*

9. A burgess who has taken part in the electi councillors for a borough, is not a competent m for a quo warranto, the object of which is to s that no valid election could possibly have been h as there was no good burgess list in existence.

10. The statute 7 Will. 4, and 1 Vict. c. s. 1, removes the defects in elections to mu pal offices under certain circumstances; s. provides that proceedings begun before that against parties so elected, shall be discontin on the payment of the costs to the relator curred up to that time. A rule nisi for a quo ranto having been obtained previous to the passi that act, and no costs having been tendered to relator, the Court held the discontinuance conditi on the payment of costs, and made the rule abso *The Queen v. Jones*, 673.

11. Where one, with a view to preserve peace, been party to an arrangement for the election of other to a municipal office, the Court will not a him, as relator, afterwards to question that electi quo warranto. *Id.*

12. *Quære*, whether he will be permitted, mere deponent, to make affidavit in support of application? *Id.*

RATE.

See CHAPEL, 3. POOR, I. SESSIONS, 18, 19, SEWERS.

RECORD.—See CRIMINAL MATTERS, 3.

RENT-CHARGE.—See LANDLORD and TENA

REPLEVIN.

The Statute of Marlbridge (52 H. 3, c. 21,) not empower the sheriff of the county to re goods within a liberty, having prescriptive rig grant replevins, until after a demand has been on the bailiff of the liberty to replevy, and a re by him to comply with the demand. *Mouns Dawson and another*, 283.

RESTITUTION.—See EJECTMENT, 37.

RESTRAINT OF TRADE.

A covenant by carriers to relinquish a certain tion of their carrying trade, and abstain from cising it within certain limits for ever, on consi tion of receiving one-third of the carriage of ea scription of goods, is not illegal as in restrai trade, and the Court will not enter into an inqui to the adequacy of the consideration. *Archa others v. Marsh*, 641.

RULES OF COURT.

1. Rule as to the hours when the offices Court are to be kept open. 340.

2. Rule as to the fees payable in respect of filed by sheriffs. 340.

3. Rule appointing the examiners for the admission of attornies. 339.

4. Rules to be observed on trials for felonies, where the defendants have counsel. 181.

Rules of Court on which decisions are reported.

H. 28 Char. 2. Rules of K. B. Prison. *In re Gomperts*, 300.

T. 1 Will. 4, s. 2, 3. Bail. *Cripp's Bail*, 387; *Carter's Bail*, 187; *Delwarte's Bail*, 390.

H. 2 Will. 4, I. s. 5. Affidavit. *Boskay* v. *Lister*, 216; *Themans* v. *Fenn*, 217; *Ex parte Edmonds*, 369.

——————— s. 6. Affidavit. *Doe* d. *Grant* v. *Roe*, 68; *Kidd* v. *Davis*, 189.

——————— s. 13. Bail. *Reynolds' Bail*, 389.

——————— s. 14. Bail. *Craig and others* v. *Evans*, 386.

——————— s. 16. Notice of justification of bail. *Wilson* v. *Hawkins*, 45.

——————— s. 24. Bail-bond. *Robinson* v. *Hawkins*, 575.

——————— s. 33. Irregularity. *Tory* v. *Stevens*, 589.

——————— s. 64. Costs of first trial. *De Rutzen and Wife* v. *Lloyd*, 473.

——————— s. 70. Judgment as in case of a nonsuit. *Fox* v. *M'Culloch*, 183; *Stacey* v. *Jeffrys*, 184.

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——————— s. 81. Bail. *Sanderson* v. *Brown*, 507.

——————— s. 88. Supersedeas. *Roxburg* v. *Creswell*, 197.

——————— s. 98. Security for costs. *Otho, King of Greece*, v. *Wright*, 594.

H. 2 Will. 4, II. Indorsement on writ. *Ward* v. *Gregg*, 351.

H. 2 Will. 4, V. Bail-bond standing as security. *Crosley* v. *Innes*, 192.

H. 4 Will. 4. General rules, s. 2. Causes of demurrer. *Whatmore* v. *Nichols*, 188.

H. 4 Will. 4. Pleading rules, s. 1. Title of pleadings. *Collins* v. *Beaumont*, 363.

——————— s. 2. Plea puis darrein continuance. *Powell* v. *Duncan*, 198.

——————— s. 17. Payment into Court. *Booth* v. *Howard*, 54.

——————— Form No. 1. *Cox* v. *Painter*, 228; *Godfrey* v. *Clements*, 47.

H. 6 W. 4, s. 5. Admission of attorney. *Ex parte Senior*, 45; *Ex parte Crewse and others*, 346; *Ex parte Lovegrove and another*, 347; *Ex parte Martin*, 347; *Ex parte Bumps and others*, 350.

——————— s. 6. Re-admission of attorney. *Ex parte Black*, *Ex parte Collins*, 73; *Ex parte Willis*, 571.

SALE.—See PLEADING, 18.

SAVINGS' BANKS.

The clerk of a savings' bank established under 57 Geo. 3, having embezzled the money of the depositors, the Court held, that the remedy of the depositors against the trustees was not by action, and therefore granted a mandamus to compel the trustees to appoint an arbitrator under 9 Geo. 4, c. 92, s. 45. *The King* v. *The Trustees of the Mildenhall Savings' Bank*, 526.

SCIRE FACIAS.—See PLEADING, 1.

SECURITY FOR COSTS.—See COSTS, II.

SEQUESTRATION.

See INSOLVENT. PRACTICE, 48.

SESSIONS.

I. *Appeals against Removals.*

1. Since the passing of the Poor Law Amendment Act an appeal against an order of removal may be made at the next sessions after the actual removal, and need not be made at the next sessions after the service of the notice of chargeability. *The Queen* v. *The Justices of Salop*, 598.

2. At the hearing of an appeal against an order of removal, no objection to the order can be taken unless stated in the notice of the grounds of appeal, conformably to 4 & 5 W. 4, c. 76, s. 81, even though such objection appear on the face of the order. *The King* v. *The Inhabitants of Withernwick*, 19.

3. Where the settlement of the pauper in a third parish was the only ground of appeal stated by the appellants under 4 & 5 W. 4, c. 81, held, that the respondents were not bound to make out any primâ facie case of settlement in the appellant parish. *The Queen* v. *The Inhabitants of Hockworthy*, 707.

4. A copy of the pauper's examination, sent with him under an order of removal, after stating that he was hired for a year by David at T., that he there served a fortnight under the contract, set out facts which amounted to a dissolution of this contract, and stated that he served out the remainder of the year with the mother of David, then a widow, at M. the appellant parish. The appellants, in their notice of appeal, assigned as the grounds of it, that on the examination there did not appear any settlement whatever. The respondents were not allowed to shew that David had acted as the agent of his father, and therefore that the service with the widow was a continuance of the original service, so as to establish a settlement in the appellant parish. *The King* v. *The Inhabitants of Misterton*, 435.

5. A statement of a ground of appeal against an order of removal, that since the alleged settlement in the appellant parish the pauper has gained a settlement by hiring and service in the respondent parish, and also another settlement in a third parish by hiring and service, is not sufficiently explicit under the new Poor Law Act, (4 & 5 W. 4, c. 76, s. 81.) *The King* v. *The Justices of Derbyshire*, 248.

6. Where a parish has two overseers and one churchwarden, the notice of appeal may be signed by the overseers only. *Id.*

7. The notice and statement of the grounds of appeal under the Poor Law Amendment Act (4 & 5 W. 4, c. 76, s. 81,) need not be signed by more than the majority of the officers of the appellant parish; and service, without fraud, upon one of the officers of

the respondent parish, is sufficient. *The King* v. *The Justices of Warwickshire*, 438.

8. *Semble*, an assistant overseer is only an overseer to the extent of his warrant, and where his warrant is not produced, the Court will not presume that he has all the functions of an overseer. Per *Patteson*, J. *Id.*

9. Where the appellants against an order of removal gave a notice of appeal, signed by four churchwardens and four overseers, and afterwards a statement of their grounds of appeal, signed by two churchwardens and two overseers only; the Court held, that they were not estopped from shewing that there were in fact only two churchwardens and two overseers in their parish. *The Queen* v. *The Inhabitants of Church Knowle*, 627.

10. Where the respondents consent to have their own order of removal quashed, without communicating their reasons for doing so, either to the sessions or the opposing party, the judgment of sessions is conclusive against them, and they cannot be allowed to shew, on appeal against a subsequent order of removal to the same parish, that their order was quashed for mere informality. *Id.*

11. An examination stating that the pauper gained a settlement by hiring and service in the appellant parish, is not informal, because it omits to state that he also resided there. *Id.*

12. The statement of the grounds of appeal required by the new Poor Law Act (4 & 5 W. 4, c. 76, s. 81,) must be served on the overseers themselves of the respondent parish, and not on their attorney. *The King* v. *The Inhabitants of Kimbolton*, 241.

13. Where no statement of the grounds of appeal has been served upon the overseers of the respondent parish, the sessions may notwithstanding receive the appeal and adjourn the hearing of it. *Id.*

14. Where, on appeal to sessions against an order of removal, the justices quashed the order, but on application granted a case, this Court discharged with costs a rule for a mandamus to them to hear the appeal. *The King* v. *The Justices of Suffolk*, 6.

II. *Other Matters.*

15. An appeal lies to the quarter sessions against the accounts of an assistant overseer. *The Queen* v. *Watts*, 631.

16. The next quarter sessions to which an appeal lies against the accounts of an overseer, are the sessions next after such accounts have been delivered over to the succeeding overseers. *Id.*

17. Mandamus does not lie to the sessions to rehear an appeal, (even where the certiorari has been taken away,) on the ground that they have improperly rejected evidence which would have been decisive of the appeal. *Ex parte Pratt*, 455.

18. Notice of appeal against a borough rate, under 5 & 6 W. 4, c. 76, s. 92, must either state expressly or impliedly that the appellant is aggrieved. *The King* v. *The Recorder of Poole*, 497.

19. The following notice, therefore, "I, F. T., being a burgess of the borough of &c., and called upon to pay the rate or assessment hereinafter mentioned, do hereby give you notice that I intend to appeal &c." was held insufficient. *Id.*

20. The omission of the appellant's name in a poor rate is not primâ facie such a grievance as to constitute a ground of appeal against the rate. *The King* v. *George*, 32.

21. No person who is not a justice of the peace for the county has any right to inspect the bills and accounts which have been passed at sessions and deposited with the clerk of the peace, in compliance with the provisions of 12 Geo. 2, c. 29. *The King* v. *The Justices of Staffordshire*, 98.

22. If a person, convicted as a rogue and vagabond under 5 G. 4, c. 83, appeals to the quarter sessions, the convicting magistrate, after the appeal is decided, cannot re-commit him for the rest of the time of his imprisonment. *Ex parte Moore*, 72.

SETTLEMENT.—See Poor, III.

SEWERS.

A rate or assessment cannot be made by the Commissioners of Sewers upon a whole township. *Emerson* v. *Saltmarsh and others*, 618.

SHERIFF.

See also Evidence, 4. Replevin.

1. A plaintiff wrote the following letter to the under-sheriff:—

"Myself v. Dickenson.
"Aldridge v. Same.

"I inclose you writs herein, and shall feel obliged by your granting warrants thereon, directed to Mr. Bateman and Mr. Mee. I shall write to Mr. Bateman in a day or two."

Dickenson was afterwards arrested by Mee at the suit of another person, and on giving a bail-bond was discharged, no further advice having been received from the plaintiff.—Held, 1st, That the plaintiff by his letter had appointed M. and B. his special bailiffs; 2nd, That although on the arrest in the other suit the prisoner was also constructively in custody at the suit of the plaintiff, yet the sheriff was not liable for an escape, as the special agency of the officer to the plaintiff still continued. *Ford* v. *Leche*, 258.

2. Trespass for assault and false imprisonment against the sheriff of K. Plea, that the plaintiff was arrested and detained in custody under a writ of attachment for a contempt issued out of Chancery. Replication, that the contempt was for not answering a bill, that the plaintiff was in custody under such process for thirty days, that the contempt was not cleared, and that the plaintiff was not brought to the bar of the Court of Chancery, whereby it became the duty of the defendant to discharge the plaintiff:—Held, that the defendant under these circumstances was not liable in trespass. *Smith* v. *Eggington*, 532.

3. *Semble*, that in order to make him liable under 11 Geo. 4 and 1 Will. 4, c. 36, s. 15, r. 5, to an action on the case, it must be averred that he had notice of the contempt for which the party was attached and that the thirty days had expired. *Id.*

4. Where bail were not put in before the rule for bringing in the body expired, but there had been a render of the defendant, and no trial had been lost the Court refused to grant an attachment against the sheriff. *Sharman* v. *Cook*, 572.

SLAVE COMPENSATION ACT.

See Practice, 32.

STAMP.

See also EVIDENCE, 19. LANDLORD AND TENANT, 3. POOR, 15.

An exemplification of a grant of administration de bonis non recited a previous grant cum testamento annexo of the same effects to another party:—Held, that one stamp of 3*l.* was sufficient. *Doe* d. *Edwards and others* v. *Gunning and others*, 460.

STATUTES.

52 Hen. 3, c. 21. Replevin. *Mounsey* v. *Dawson and another*, 283.

43 Eliz. c. 6. Costs. *Story* v. *Hodson*, 199.

29 Car. 2, c. 3, s. 4. Agreement to pay the debt of another. *Tomlinson* v. *Gell*, 229.

——————— s. 4. Interest in land. *Mechelen* v. *Wallace*, 468.

9 & 10 Will. 3, c. 15, s. 2. Setting aside an award *Reynolds* v. *Askew*, 366.

9 & 10 Will. 3. c. 25, s. 33. Appearance. *Thomas* v. *Noakes*, 351.

8 Anne, c. 14, s. 6, 7. Distress. *Taylerson* v. *Peters and another*, 644

12 Geo. 2, c. 13, s. 7. Attorney. *Hodgkinson* v. *Mayer*, 15.

12 Geo. 2, c. 29, s. 8. Inspecting county bills, &c. *The King* v. *The Justices of Staffordshire*, 98. *The King* v. *Payn*, 142.

13 Geo. 2, c. 18, s. 5, Certiorari. Notice to justices. *The King* v. *Rattislaw*, 185.

17 Geo. 2, c. 38, s. 4. Appeal against overseers' accounts. *The Queen* v. *Watts*, 631.

24 Geo. 2, c. 44, s. 1. Notice of action to justices. *Wedge* v. *Berkeley*, 271.

6 Geo. 3, c. 25, s. 3. Master and servant. *Kitchen* v. *Shaw*, 278.

37 Geo. 3, c. 90, s. 30, 31. Attorney. *Wilton* v. *Chambers*, 701. *Hodgkinson* v. *Mayer*, 15.

38 Geo. 3, c. 78. Publication of newspaper. *Watts* v. *Fraser*, 451.

43 Geo. 3, c. 110. Money borrowed by a parish. *The King* v. *The Inhabitants of Bighton*, 330.

48 Geo. 3, c. 123. Small debts act. *Barnard* v. *Symonds*, 218.

53 Geo. 3, c. 127, s. 1, and schedule. Writ de contumace capiendo. *The King* v. *Ricketts*, 294, 297.

55 Geo. 3, c. 184. Stamp. *Field* v. *Woods*, 482.

56 Geo. 3, c. 100. Habeas corpus. *Ex parte Wyatt*, 76.

56 Geo. 3, c. 139, s. 2. Notice of assignment of an apprentice. *The King* v. *The Inhabitants of Exminster*, 244.

57 Geo. 3, c. 99, s. 74, Curates salaries. *West* (*Clerk*) v. *Turner* (*Clerk*), 252.

58 Geo. 3, c. 93. Usury. *Vallance* v. *Siddell*, 494.

3 Geo. 4, c. 72, s. 20. Chapel rate. *Craven* v. *Sanderson and others*, 694.

5 Geo. 4, c. 83. Rogues and Vagabonds. *Ex parte Moore*, 72.

6 Geo. 4, c. 16, s. 70. Mortgage by bankrupt. *Dunn and others* v. *Massey and others*, 227.

——————— s. 81, 82. Protected dealings with bankrupt. *Pearson* v. *Graham*, 691.

6 Geo. 4, c. 64. Gaol. *The King* v. *Cope*, 164.

7 Geo. 4, c. 57, s. 76. Evidence of insolvent proceedings. *Doe* d. *Threlfall and another* v. *Sellers*, 160. *Doe* d. *Ellis* v. *Hardy*, 614.

9 Geo. 4, c. 92, s. 45. Savings' bank. *The King* v. *The Trustees of the Mildenhall Savings' Bank*, 526.

11 Geo. 4 & 1 Will. 4, c. 36, s. 15, rule 5. Contempt. *Smith* v. *Eggington*, 532.

1 Will. 4, c. 18. Settlement by payment of rates. *The King* v. *The Inhabitants of Stoke Damarel*, 25.

——————— Settlement by renting. *The King* v. *The Inhabitants of Berkswell*, 30.

1 Will. 4, c. 21. Mandamus. *The King* v. *The Overseers of Edlaston*, 163.

2 & 3 Will. 4, c. 39, s. 4. Arrest. *Shearman* v. *Macknight*, 189.

——————— Sched. No. 4. Indorsement on capias. *Cooke* v. *Cooper*, 683.

3 & 4 Will. 4, c. 27, s. 7, 15. Limitation of action. *Doe* d. *Thompson* v. *Thompson*, 236.

3 & 4 Will. 4, c. 42, s. 2. Action against administrator. *Powell and others* v. *Rees*, 680.

3 & 4 Will. 4, c. 98, s. 7. Usury. *Vallance* v. *Siddell*, 494.

4 & 5 Will. 4, c. 76, s. 26. Unions. *The King* v. *The Poor Law Commissioners*, 440.

——————— s. 39. Board of guardians. *The King* v. *The Poor Law Commissioners*, 79.

——————— s. 54. Casual Poor. *The King* v. *The Directors of the Poor of St. Pancras*, 362.

——————— s. 57. Children of a former marriage. *The King* v. *The Inhabitants of Walthamstow*, 23.

——————— s. 65. Hiring and service. *The King* v. *The Inhabitants of Rittenden*, 21.

——————— s. 79 Appeal against order of removal. *The Queen* v. *The Justices of Salop*, 598.

——————— s. 81. Notice of grounds of appeal. *The King* v. *The Inhabitants of Withernwick*, 19. *The King* v. *The Inhabitants of Kimbolton*, 241. *The King* v. *The Justices of Derbyshire*, 248. *The King* v. *The Inhabitants of Misterton*, 435. *The King* v. *The Justices of Warwickshire*, 438. *The Queen* v. *The Inhabitants of Hockworthy*, 707.

5 & 6 Will. 4, c. 41. Gaming. *Hitchcock* v. *Way*, 491.

5 & 6 Will. 4, c. 76, s. 66. Compensation to corporate officers. *The King* v. *The Mayor, &c. of Bridgewater*, 129. *Ex parte Lee*, 471.

——————— s. 92. Notice of appeal. *The King* v. *The Recorder of Poole*, 497.

——————— Sched. A. *The King* v. *Greene and others*, 291.

7 Will. 4, & 1 Vict. c. 78, s. 20. Quo Warranto. *The Queen* v. *Jones*, 673.

SURETY.

Debt on bond by defendant as surety for the performance by S. of certain works according to contract with the plaintiff, within a time specified, and for a specified sum; breach, that S. did not complete the works in time, and that plaintiffs were compelled to employ another person at great additional expense: plea, non est factum. By the terms of the contract, S. was to be paid every two months for three-fourths of the value of the work done, and for the remaining fourth when the whole work was completed. At the time specified, S. was bankrupt, the work was not completed, and the plaintiffs had already advanced him sums of money beyond the entire value of his work. Another person was then employed to complete the work, and the aggregate amount of what was paid to him and to S. greatly exceeded the contract price, but came within it if the sums advanced to S. over and above the value of his work were deducted:—Held, that though the defendant was liable on his bond, because S. had not performed the work by the time stipulated, nominal damages only could be recovered, as the plaintiff's loss arose in consequence of advances made to S. not according to the contract, and that this defence might be set up in mitigation of damages, under the plea of non est factum. *Warre and another* v. *Calvert*, 528.

TENDER.

1. Whether or not words which are ambiguous amount to a tender, is a question for the jury to determine. *Eckstein and another* v. *Reynolds*, 480.

2. "I tender you 8*l.* in settlement of R.'s bill." R.'s whole demand was for a greater amount. The Court held that these words were ambiguous, and refused to disturb a finding by the jury, that they amounted to an absolute tender. *Id.*

TORT, ACTION OF.—See EXECUTOR, 1.

TRESPASS.—See ATTORNEY, 33. DAMAGES. SHERIFF, 2.

TROVER.—See BANKRUPT, 2. EVIDENCE, 21.

TRUSTEES.—See PLEADING, 21.

USE AND OCCUPATION.

See LANDLORD AND TENANT, 4.

USURY.

See also WARRANT OF ATTORNEY, 3.

1. The 58 Geo. 3, c. 93, protects bills and notes given for usurious considerations in the hands of an indorsee who discounts or pays other value for such bills and notes at the time of taking them, but not where he receives them for an antecedent debt. *Vallance* v. *Siddell*, 494.

2. The 3 & 4 Will. 4, c. 98, s. 7, allowing more than 5*l.* per cent. interest to be taken on bills and notes payable at or within three months after date, extends to notes payable on demand. *Id.*

WARRANT OF ATTORNEY.

See also COGNOVIT.

1. Rule for judgment on an old warrant of attorney granted, on an affidavit of a person who had paid a check in the handwriting of the defendant a few days previously. *Jacobs* v. *Griffiths*, 206.

2. Rule for judgment on an ol
torney refused, where the affidavit
deponent believed the defendant t
information he had received; but
believed the information to be true.
and another, 206.

3. The Court will defer charging
execution on a judgment on a war
until a motion is made for setting as
on the ground of usury in the transa
v. *Whateman*, 571.

WARRANTY.

See also INSURANCE. PLEA

1. Action for breach of warranty
declaration stated as special dama
incurred for examining the horse, an
tiff having resold the horse for a higl
on discovery of the unsoundness, r
and that he lost all the advantag
There was no averment that the high
tained by reason of any expense,
bestowed by the plaintiff; nor did the
it to be put to the jury, whether th
time he bought it, was actually wo
price:—Held, that he was not entitle
difference between the price paid an
which the horse was resold by him,
no circumstances could he recover th
curred by examining the horse. *Cla*
274.

2. Quære, if he would have been e
ver the difference, had the jury found
was actually worth the higher price at
first sale. *Id.*

WILL.

See also DEVISE.

1. A testator threw his will into th
purpose of destroying it. The envelo
was singed, but before the will itself
any injury it was rescued by the defe
visee under the will,) who fed the test
it had been destroyed. The testator
pressed his satisfaction, and said he
another will:—Held, that as there wa
of any part of the will itself, no act
within the meaning of the statute of fi
its revocation, and that the circumsta
tempt to revoke it having been frustrat
fendant herself made no difference. *L*
Harris, 106.

2. Testator, in the presence of a devi
will, with whom he was displeased, th
contained in an envelope, into the fi
without his knowledge rescued it.
when informed of this, expressed his ar
his intention to make a new will instead
out however taking any steps for either
tion of the old or the making of the
Held, on ejectment as to the copyh
devised by the will, 1st. That it was pr
the jury to say whether the testator ha
will, although the act done by him with
was not accompanied by any declarati
tion; 2nd. That his knowledge of th
existence of the will, intended to be des
out taking any further steps to destroy

a new one, did not afford any evidence of republication to be left to a jury. *Doe* d. *Read* v. *Harris*, 684.

3. The revocation of a will by the subsequent marriage of the testator, and the birth of a child, is founded on a rule of law altogether independent of any question of intention of the testator, and consequently no evidence of the testator's intention that his will should not be revoked, is admissible to rebut the presumption of law in favour of such revocation. *Marston* v. *Roe* d. *Fox and another* (*In error*), 712.

4. In order to prevent the revocation of the will, and take the case out of the general rule, it is not sufficient that a provision is made for the wife only, but such provision must extend also to the children of the marriage. *Id.*

5. *Semble*, that after-acquired property descending from the children, will not prevent the revocation. *Id.*

6. If the testator be heir at law to A., and A. agree to purchase an estate, and then die intestate and unmarried, the equitable interest in such estate immediately descends to the testator; and if the testator, while the equitable interest is in him, make a will containing a general devise of all his real estates, the equitable interest will pass to the devisee under his will, though the will be dated before the agreement to purchase is to be carried into execution; and the subsequent conveyance of the legal estate to the testator will give no real or beneficiary interest to his heir at law, but will make him a trustee for the devisee. *Marston* v. *Roe* d. *Fox and another* (*In error*), 712.

7. The descent of this legal estate on the child of the marriage, forms no such provision for him as to procure the revocation of the will. *Id.*

8. In ejectment between a devisee under a will, made previous to marriage and the birth of a child, and the heir at law, the issue of such marriage, previous wills by the testator are admissible in evidence for the devisee. *Id.*

9. Declaration by the testator, previous to marriage, on the subject of his intended wife's dower, are admissible in evidence for the heir at law. *Id.*

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